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SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 34000

CANADIAN NATIONAL RAILWAY COMPANY,
GRAND TRUNK CORPORATION, AND WC MERGER SUB, INC.
— CONTROL —
WISCONSIN CENTRAL TRANSPORTATION CORPORATION,
WISCONSIN CENTRAL LTD., FOX VALLEY & WESTERN LTD.,
SAULT STE. MARIE BRIDGE COMPANY, AND
WISCONSIN CHICAGO LINK LTD.

Decision No. 10

Decided: September 5, 2001

The Board approves, with certain conditions, the acquisition of control by Canadian National Railway Company and Grand Trunk Corporation of Wisconsin Central Transportation Corporation and its U.S. rail carrier subsidiaries (Wisconsin Central Ltd., Fox Valley & Western Ltd., Sault Ste. Marie Bridge Company, and Wisconsin Chicago Link Ltd.).

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INTRODUCTION¹

The CN/WC Control Application. By application filed April 9, 2001, Canadian National Railway Company (CNR), Grand Trunk Corporation (GTC), and WC Merger Sub, Inc. (Merger Sub),² and Wisconsin Central Transportation Corporation (WCTC), Wisconsin Central Ltd. (WCL), Fox Valley & Western Ltd. (FVW), Sault Ste. Marie Bridge Company (SSMB), and Wisconsin Chicago Link Ltd. (WCLL),³ seek approval under 49 U.S.C. 11321-26 for the acquisition of control by CNR and GTC of WCTC and WCTC's U.S. rail carrier subsidiaries (WCL, FVW, SSMB, and WCLL).⁴

¹ Abbreviations frequently used in this decision are listed in Appendix A. Unless otherwise indicated, all monetary amounts referenced in this decision are stated in U.S. dollars.

² CNR, a rail carrier, controls several rail carriers in the United States through its wholly owned GTC subsidiary (a noncarrier holding company): Grand Trunk Western Railroad Incorporated (GTW); Duluth, Winnipeg & Pacific Railway Company (DWP); St. Clair Tunnel Company (SCTC); Illinois Central Railroad Company (IC); Chicago, Central & Pacific Railroad Company (CCP); Cedar River Railroad Company (CRRC); and Waterloo Railway Company (WRC). CNR, GTC, and Merger Sub (Merger Sub is a wholly owned subsidiary of GTC), and their wholly owned (directly or indirectly) subsidiaries (including GTW, DWP, SCTC, IC, CCP, CRRC, and WRC), are referred to collectively as Canadian National or CN.

³ WCTC (a noncarrier) and its wholly owned North American rail carrier subsidiaries — WCL, FVW, SSMB, and WCLL, which operate in the United States; and Algoma Central Railway, Inc. (ACRI), which operates in Canada — are referred to collectively as Wisconsin Central or WC. CN and WC are referred to collectively as applicants.

⁴ The transaction for which approval is sought is variously referred to as the control transaction and the “merger.” This transaction is classified as a minor transaction. See 49 CFR (continued...)

Parties Supporting The CN/WC Control Application. The CN/WC control application has been endorsed by more than 350 parties, including more than 275 shippers. See CN/WC-2, Vol. 2 at 1-468; CN/WC-16 at 109-244.

Comments Filed: Shipper Parties. Submissions respecting the CN/WC control application have been filed by various shipper parties, including The National Industrial Transportation League (NITL), AK Steel Corporation (AK Steel),⁵ U.S. Clay Producers Traffic Association, Inc. (USCPTA), ONDEO Nalco Company (ONDEO Nalco),⁶ The Procter & Gamble Company (P&G), United States Steel LLC (U.S. Steel),⁷ Vulcan Chemicals (Vulcan),⁸ Wisconsin Manufacturers & Commerce (WMC), Wisconsin Public Service Corporation (WPS), Celgar Pulp Company (Celgar), Tembec Inc. (Tembec), MC Forest Products Inc. (MC Forest), and IMC Global, Inc. (IMC Global). The shippers' evidence, arguments, and any related requests for affirmative relief are summarized in Appendix B.

⁴(...continued)
1180.2(c) (classification of transactions under 49 U.S.C. 11323), as applied in Decision No. 2 (served May 9, 2001, and published that day at 66 FR 23757).

⁵ AK Steel's motion (AKS-11, filed Aug. 7, 2001) to strike a GLT reply (GLT-19) is denied in the interest of a full record.

⁶ We grant ONDEO Nalco's request to accept its comments that were filed 3 days late.

⁷ The CN/WC control transaction itself did not raise issues of concern to U.S. Steel. Upon learning of the settlement agreement between CN and Great Lakes Transportation LLC (GLT), however, U.S. Steel sought leave on July 6, 2001 to late-file a notice of intent to participate. We grant the requested leave and admit U.S. Steel's comments into the record. On August 2, 2001, U.S. Steel asked us to accept a submission (USS-4) and to reject a GLT reply (GLT-19). In the interest of a full record, we grant the former request and deny the latter.

⁸ Vulcan's motion for leave to clarify the record (VUL-3, filed July 31, 2001) is granted. Applicants' request for leave to reply to the Vulcan motion (CN/WC-17, filed Aug. 6, 2001) also is granted.

Comments Filed: Carrier Parties. Various carrier parties filed submissions: Canadian Pacific (CP),⁹ GLT,¹⁰ RailAmerica, Inc. (RailAmerica), the Transportation Institute, and the National Railroad Passenger Corporation (Amtrak). Appendix C contains a summary of the evidence, arguments, and any related requests for affirmative relief contained in these submissions.

Comments Filed: Governmental Parties. Various governmental parties submitted comments respecting the CN/WC control application: the United States Department of Transportation (DOT), the United States Department of Agriculture (USDA), the Illinois Department of Transportation (IDOT), the State of Michigan (Governor John Engler), the Wisconsin Department of Transportation (WisDOT), the City of Des Plaines, IL (City of Des Plaines), the City of East Chicago, IN (City of East Chicago), the City of Gary, IN (City of Gary), and the City of Hammond, IN (City of Hammond). The evidence, arguments, and any requests for affirmative relief contained in these submissions are summarized in Appendix D.

Comments Filed: Labor Parties. The following labor interests submitted comments: the Brotherhood of Locomotive Engineers (BLE), the American Train Dispatchers Department of the Brotherhood of Locomotive Engineers (ATDD), the Brotherhood of Maintenance of Way Employees (BMWE), the International Association of Machinists and Aerospace Workers (IAMAW), the International Brotherhood of Electrical Workers (IBEW),¹¹ the United Transportation Union (UTU), the Brotherhood of Railroad Signalmen (BRS), the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (IBB), the National Council of Firemen and Oilers/SEIU (NCFO), and the Sheet Metal Workers International Association (SMW).¹² The evidence, arguments, and any related requests for affirmative relief contained in these submissions are summarized in Appendix E.

⁹ Canadian Pacific Railway Company (CPR), Soo Line Railroad Company (Soo), Delaware and Hudson Railway Company, Inc. (D&H), and St. Lawrence and Hudson Railway Company Limited (St.L&H) are referred to collectively as Canadian Pacific or CP.

¹⁰ GLT owns the Duluth, Missabe, and Iron Range Railroad Company (DM&IR), USS Great Lakes Fleet, Inc. (USS Fleet), the Bessemer and Lake Erie Railroad Company (B&LE), and the Pittsburgh & Conneaut Dock Company (P&C Dock). GLT's request for leave to file its GLT-19 reply (filed July 31, 2001) is granted.

¹¹ IAMAW and IBEW filed jointly.

¹² BRS, IBB, NCFO, and SMW (referred to collectively as the Allied Rail Unions or ARU) filed jointly.

Summary Of Decision. In this decision, we are approving CN's acquisition of control of WCTC and WCTC's U.S. rail carrier subsidiaries, and the integration of the rail operations of CN and WC, as proposed in the CN/WC control application. We are imposing a condition holding applicants to their representations: (1) that the unified CN/WC will keep all existing active gateways affected by the transaction open on commercially reasonable terms; and (2) that applicants will waive defenses they might otherwise have (as a result of the transaction) under our bottleneck rates policy (where prior to the transaction a shipper would have been entitled to regulation of a bottleneck rate). We are also imposing the New York Dock¹³ labor protective conditions on the transaction. Further, we are imposing a condition that applicants report for 1 year on the progress of the integration of their operations. As concerns safety, we are requiring applicants: (1) to comply with their Safety Integration Plan (SIP); and (2) to participate and fully cooperate in ongoing activities with the Federal Railroad Administration (FRA) and us related to the Memorandum of Understanding (MOU) between the Board and the FRA, until FRA advises us that the transaction has been safety implemented. We are denying all other conditions sought by the various parties to this proceeding.

THE CN/WC CONTROL TRANSACTION

Canadian National. CN provides single-line service linking markets in Western and Eastern Canada with markets in the Midwest, the Mississippi Valley, and along the Gulf Coast.¹⁴ It operates 11,620 route miles in Canada, extending west to Prince Rupert and Vancouver, BC, and east to Halifax, NS. CN's 3,912 route miles in the United States reach several major cities: Duluth, MN/Superior, WI; Chicago, IL; Detroit, MI; Buffalo, NY; St. Louis, MO; New Orleans, LA; and Memphis, TN. Because CN neither owns nor has trackage rights over any of the lines that connect Superior with Chicago, CN freight moving between those cities must be hauled on CN's behalf by another railroad. Since 1998, CN has relied upon WC to make that haul under agreements that will expire in 2007 (intermodal traffic) and 2018 (other traffic). Under the haulage agreements, CN does not have the right to serve shippers located on WC.

Wisconsin Central. WC's 2,464 route miles in the United States include a main line extending from outside Chicago to Superior. Another WC line extends to Withrow, MN, and then, via trackage rights over CP, to Minneapolis/St. Paul, MN. Other WC lines extend into the

¹³ New York Dock Ry. — Control — Brooklyn Eastern Dist., 360 I.C.C. 60 (1979).

¹⁴ CN adds that, as a result of its acquisition of control of Illinois Central in 1999 and in connection with a marketing alliance with The Kansas City Southern Railway Company (KCS), CN has become part of a North American Free Trade Agreement (NAFTA) network offering shippers access to Transportación Ferroviaria Mexicana, S.A. de C.V. (TFM), Mexico's largest rail system.

State of Wisconsin to Green Bay, Milwaukee, Wausau, Wisconsin Rapids, Ashland, and East Winona, and into the Upper Peninsula of Michigan, including the lake docks at Escanaba. Through a subsidiary, WC also operates a 296-mile line in Canada between Sault Ste. Marie, ON, and Hearst, ON. WC's major interchange locations are Chicago, Superior, and Minneapolis/St. Paul in the United States and Sault Ste. Marie in Canada.

The Combined CN/WC Network. The routes of the combined CN/WC rail system will be identical to those of the individual railroads, with the addition of through routes where interchange or haulage is now required. Applicants claim that, given the end-to-end nature of the CN and WC systems, the CN/WC control transaction will have no anticompetitive effects, including no adverse "vertical" effects on competition. Further, applicants claim that the transaction will not reduce effective source competition or geographic competition, will not increase market power, will not render any CN or WC track redundant, and will not result in any abandonments. In addition, applicants claim that there is no shipper receiving rail service from applicants today for which the CN/WC control transaction would result in either a 3-to-2 or a 2-to-1 reduction in the number of independent railroads providing service to the shipper.

Purposes Served. Although WC presently works cooperatively with CN through haulage agreements, CN has no assurance that WC will continue to cooperate, beyond the strict letter of the agreements, to develop traffic between Canada and the Chicago gateway. Nor is there any assurance that WC will be willing to renew the agreements, let alone on terms favorable to CN. By acquiring WC, CN will be able to secure service between Superior and Chicago and will be able to plan with confidence to develop traffic moving between Canada through the Chicago gateway and points in the Mississippi Valley, the Gulf Coast, and Mexico. Applicants claim that common control also will eliminate the interchanges between CN and WC at Superior and Chicago, will make a larger pool of locomotives and railcars available to meet demand, and will result in improved car utilization.

Public Interest Justifications. According to applicants, there will be public benefits from the increased efficiencies that will result from common control, including faster movement of goods between Western Canada, the Great Lakes states, and the Mississippi Valley and more effective competition in NAFTA markets. Many shippers will benefit from first-time or additional single-line service, efficient routing and car handling, and better use of equipment and assets. Applicants particularly anticipate efficiencies by reducing the need to block traffic or handle cars in Chicago. Applicants estimate that common control will generate about \$52 million in operating efficiencies and cost savings each year. See CN/WC-2, Vol. 1 at 38.

Anticipated Traffic Increases. Applicants estimate that, once the CN/WC control transaction has been fully implemented, the unified CN/WC will experience total gains of approximately 40,517 carloads of traffic and approximately \$65.9 million of gross revenue. See CN/WC-2, Vol. 1 at 290.

Implementation. If the CN/WC control transaction is approved, CN will consummate control of WC as soon as possible after the final order of the Board approving the transaction has become effective. Applicants expect to have fully integrated the CN and WC systems within 3 years of consummation of the transaction.

Service Assurance Plan. Applicants expect that implementation of the control transaction will proceed smoothly. As reasons they cite the limited scope of the transaction, the relatively recent experience of both CN and WC in successfully implementing rail consolidations, the good operating condition of both systems, and the absence of any need for immediate, sweeping changes in systems or operations. Applicants add that their Service Assurance Plan (SAP) documents their commitment to maintain effective service. They point out that there will be only modest, gradual changes in operations as a result of the CN/WC control transaction (to be introduced only after necessary planning and training), and pledge that shippers will not suffer deterioration in the quality of rail service from CN or WC as a result of the control transaction.

Impacts On Passenger And Commuter Service. Applicants state that the CN/WC control transaction will not cause any identifiable, adverse effects on intercity passenger and commuter operations on CN's and WC's systems in the United States and Canada. See CN/WC-2, Vol. 1 at 393-98.

Gateways. According to applicants, a unified CN/WC will not engage in "vertical foreclosure" by closing efficient gateways, CN/WC-2, Vol. 1 at 14 n.13, but, rather, "will keep all existing active gateways affected by the Transaction open on commercially reasonable terms." CN/WC-2, Vol. 1 at 14 and 150. For ease of reference, we will call this representation the "open gateways pledge."

Bottleneck Rule; Contract Exception. Railroads ordinarily may select the type of rate they will provide for through transportation involving more than one carrier, and the reasonableness of their rates normally is judged based on the total transportation charges from origin to destination. Under our bottleneck rates policy, however, a shipper that has access to only one railroad (a "bottleneck" carrier) for part of the movement of its traffic may separately challenge the bottleneck portion of the movement under the contract exception.¹⁵ Applicants have represented that they will "waive any defenses they might otherwise have as a result of the Transaction, under the Board's general rule that it does not separately regulate bottleneck rates, in circumstances where a shipper prior to the Transaction would have been entitled to regulation of a bottleneck rate under the Board's 'contract exception' to the general rule." CN/WC-2,

¹⁵ See Central Power & Light Co. v. Southern Pac. Transp. Co., 1 S.T.B. 1059 (1996), clarified, 2 S.T.B. 235 (1997), aff'd sub nom. MidAmerican Energy Co. v. STB, 169 F.3d 1099 (8th Cir. 1999), cert. denied sub nom. Western Coal Traffic League v. STB, 528 U.S. 950 (1999); Union Pac. R.R. v. STB, 202 F.3d 337 (D.C. Cir. 2000).

Vol. 1 at 14. We will call this representation the “bottleneck-waiver pledge.” Applicants have asked us to impose adherence to this pledge as a condition of approval of the transaction. CN/WC-16 at 38.

Agreement And Plan Of Merger; Financial Terms; Financing Arrangements. CNR, Merger Sub, and WCTC entered into an Agreement and Plan of Merger (the CN/WC Agreement), which provides that, subject to Board authorization and other conditions, Merger Sub will be merged into WCTC, whereupon the separate existence of Merger Sub will cease and WCTC and its rail carrier subsidiaries will become indirect wholly owned subsidiaries of CNR. The CN/WC Agreement further provides that, upon the merger of Merger Sub into WCTC, each share of WCTC common stock that was outstanding immediately prior to the merger will be converted into the right to receive \$17.15 in cash. WCTC’s shareholders approved the CN/WC Agreement (approximately 79% of WCTC’s outstanding shares were voted on the proposal, and 99% of those shares voted in favor of the CN/WC Agreement). Under an existing credit facility, CN will borrow approximately \$800 million in cash to acquire the WCTC common stock. CN expects that, within approximately 6 months after consummation of the transaction, it will repay a portion of the initial borrowing with the proceeds of newly issued term debt. CN further expects that, during 2002, it will repay the remainder of the initial borrowing with internally generated funds and with the proceeds from the disposition of WC’s international holdings.¹⁶

Fairness Determination. Applicants seek a determination that the terms under which CNR will acquire indirect ownership of the common stock of WCTC are just and reasonable to the shareholders of CNR and to the shareholders of WCTC. See Schwabacher v. United States, 334 U.S. 192 (1948).

Labor Impact; Labor Protective Conditions. Applicants predict that the CN/WC control transaction will have a relatively small impact on CN/WC’s employment levels with 260 jobs abolished and 7 jobs transferred. See CN/WC-2, Vol. 1 at 416-19. Applicants explain that the transaction will generate efficiency gains that will likely affect employment levels in three primary areas: a streamlining of duplicative administrative activities; significant improvements in equipment utilization and maintenance activities; and maintenance-of-way efficiencies. Applicants expect that the New York Dock labor protective conditions will cover employees adversely affected by the transaction. Applicants promise that, if changes to existing collective bargaining agreements are required to effect the expected efficiencies, they will attempt to achieve such changes through negotiation. Applicants add that additional changes necessary to

¹⁶ Applicants state that CN can comfortably carry out the CN/WC control transaction without significant impacts on its financial strength, applicants expect to incur only modest additional capital expenditures, and a unified CN/WC will easily absorb the incremental fixed charges attributable to the transaction.

implement the transaction may become apparent only after applicants have had an opportunity to gain experience in the course of implementation of the transaction and in the actual operation of the CN/WC system.

DISCUSSION AND CONCLUSIONS

Statutory Criteria. Under 49 U.S.C. 11323(a)(3) and (5), the acquisition of control of a rail carrier by another rail carrier or by a noncarrier that controls another rail carrier requires prior Board approval. The criteria for approval are set forth in 49 U.S.C. 11324. Because the CN/WC control transaction does not involve the merger or control of two or more Class I railroads,¹⁷ this transaction is governed by § 11324(d), under which we must approve a control application unless we find that: (1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and (2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

In transactions subject to § 11324(d), the primary focus is on the likely competitive effects. We must grant the application unless there will be adverse competitive impacts that are both “likely” and “substantial.” And, even if there will be “likely” and “substantial” anticompetitive impacts, we may not disapprove the transaction unless the anticompetitive impacts outweigh the public interest factors and cannot be mitigated through conditions.¹⁸ See Kansas City Southern Industries, Inc., KCS Transportation Company, and The Kansas City Southern Railway Company — Control — Gateway Western Railway Company and Gateway Eastern Railway Company, STB Finance Docket No. 33311 (STB served May 1, 1997), slip op. at 4; CSX Corporation and CSX Transportation, Inc. — Control — The Indiana Rail Road Company, STB Finance Docket No. 32892 (STB served Nov. 7, 1996), slip op. at 3-4; Illinois Central Corporation and Illinois Central Railroad Company — Control — CCP Holdings, Inc., Chicago, Central & Pacific Railroad Company and Cedar River Railroad Company, STB Finance Docket No. 32858 (STB served May 14, 1996), slip op. at 3.

¹⁷ In Major Rail Consolidation Procedures, STB Ex Parte No. 582 (Sub-No. 1) (STB served June 11, 2001, and published in the Federal Register on June 15, 2001, at 66 FR 32582), we adopted new regulations that will govern future proposals for rail consolidation transactions that involve the control or merger of two or more Class I railroads. These regulations are not applicable here, because the CN/WC control transaction does not involve the control or merger of two or more Class I railroads.

¹⁸ Under 49 U.S.C. 11324(c), the Board has broad authority to place conditions on approval of § 11323 transactions.

General Competitive Analysis. The evidence demonstrates that the CN/WC control transaction will cause no harm to competition. All shippers served by both CN and WC are also served by at least two other railroads.¹⁹ For example, while CN and WC meet at Superior over DM&IR, at least 3 or 4 other railroads have access to shippers there and at the nearby City of Duluth, MN. At Chicago, multiple railroads will continue to have access to shippers after CN and WC have combined. Thus, we find that there are no 2-to-1 or 3-to-2 shippers on the CN/WC system.

Turning to geographic competition, we examine the effect of the transaction on source competition, when two carriers transport the same product to the same destination but from different geographic origins, or conversely when two carriers transport the same product from the same origin to two different destinations. No commenters questioned applicants' extensive analysis or conclusion that there would not be a diminishment in source competition as a result of the transaction. Based on the record, we find that the transaction will not lead to a reduction in geographic competition.

Finally, we consider whether the transaction will increase CN's or WC's market power. Because there are no rail corridors in which CN and WC compete, and, as noted above, no 2-to-1 or 3-to-2 shippers and no expected reduction in geographic competition, we find that the transaction will not result in an increase in either carrier's market power. We approve the application because the evidence demonstrates that there is not likely to be either a substantial lessening of competition, the creation of a monopoly, or a restraint of trade in freight surface transportation in any region of the United States as a result of the CN/WC control transaction.

The evidence further demonstrates that the essentially end-to-end configuration of the CN/WC control transaction will benefit shippers by enabling CN to secure, and to increase to the maximum extent possible the efficiency of, its Superior-Chicago NAFTA route connecting Western Canada and the Central United States. As a result of the transaction, CN/WC will be able to offer expanded single-line service and other large network advantages, including the availability of a larger supply of well-maintained locomotives and railcars. In addition, CN/WC will be able to achieve important cost-saving benefits without large labor force reductions or a wholesale restructuring of rail facilities. The evidence also demonstrates that customers of both CN and WC will benefit from shortened car transit times, increased reliability, and other service improvements and operating efficiencies fostered by the transaction, that CN will remain

¹⁹ Only Oba, ON, appears to be a 2-to-1 location. It is a remote junction at which the two carriers interchange traffic but do not compete. In 1999, WC originated loads of logs at Oba and had no traffic terminating there. CN does not originate or terminate traffic or switch customers at Oba. CN/WC-2, Vol. 1 at 178. Therefore, we find that there are no 2-to-1 customers at Oba, and thus no U.S. shippers that would face a merger-related reduction in competition for rail movements to or from Oba.

financially strong after consummation of the transaction, and that CN will have the financial resources to maintain the integrated CN/WC system in top condition. These beneficial effects for shippers provide additional support for approval of the transaction.

NITL/CN Agreement. In response to the anticipated CN/WC application, NITL and CN privately negotiated an agreement for the benefit of shippers and receivers of freight whose rail movements originate or terminate on WC, to apply when the transaction is consummated. As described more fully in Appendix B, the NITL/CN Agreement contains provisions to (1) protect the level of service as measured by transit times, (2) keep existing gateways open through establishing reasonable contract and common carrier rates, and (3) resolve through arbitration disputes between shippers and CN/WC arising under the agreement.

Neither NITL nor CN²⁰ has asked us to impose the terms of the NITL/CN Agreement as a condition to approval of the transaction. There is no evidence indicating that the terms of the NITL/CN Agreement must be imposed as a condition to remedy adverse consequences of the control transaction. Consequently, we will not impose the terms as a condition.

We will, however, hold applicants to representations they have made in this record about the meaning and reach of the NITL/CN Agreement. See CN/WC-16 at 65-69. For example, applicants state that the agreement's definition of shipper (any shipper or receiver of property on CN and/or WC) includes shippers whose facilities are not physically located on CN's or WC's lines, but whose movements originate or terminate on WC. Thus, if there were a prior or subsequent drayage from or to a shipper facility, that movement would be covered so long as the rail portion originated or terminated on WC. CN/WC-16 at 66.

Gateways. The interchange protection provisions of the NITL/CN Agreement are designed to keep open active gateways with connecting carriers (i.e., those that were used during the year prior to the date of the agreement — April 27, 2001). The Agreement covers both contract and common carrier rates. Concerning contract rates, the Agreement provides that, at the request of a shipper, CN/WC will establish (and keep in effect) commercially reasonable contract through rates for all of its active gateways. For common carrier rates, applicants pledge that for 5 years they will not increase their portion of through rates that are in effect on the date of consummation of the transaction and that applied to transportation of freight in the prior year, except to take increases no greater than the change in certain indices of railroad costs. Further,

²⁰ Notwithstanding a misleading heading in applicants' rebuttal submission that seems to ask for imposition of the terms of the NITL/CN Agreement, CN/WC-16 at 26, applicants do not make such a request. The text following the heading asks only for the imposition of applicants' separate pledge to waive certain defenses under our bottleneck rates policy, which we discuss below. See CN/WC-16 at 38.

after the 5-year pledge has expired, CN/WC pledge not to close by any commercially unreasonable means any interchange then in active use between WC and any other rail carrier.

Outside the terms of the NITL/CN Agreement, applicants made representations concerning preservation of gateways. They state that a unified CN/WC will not engage in “vertical foreclosure” by closing efficient gateways. CN/WC-2, Vol. 1 at 14 n.13. Rather, they pledge to “keep all existing active gateways affected by the Transaction open on commercially reasonable terms.” CN/WC-2, Vol. 1 at 14 and 150. We will hold applicants to this representation. We note that, if the combined CN/WC complies with the voluntary interchange protection provision of the NITL/CN Agreement, it will also be in compliance with this separate representation.

Several parties have argued that applicants’ representation about gateways is not sufficient. CP argued that the NITL/CN Agreement requires a shipper to negotiate directly with applicants for a commercially reasonable contract rate for the CN/WC portion of an interline movement that involves other connecting carriers. But according to CP and four shippers,²¹ it would place an unreasonable burden on shippers to have to negotiate separately with CN/WC as well as with the other carrier(s) involved in an interline movement.²² CP and the four shippers contend that the NITL/CN Agreement places an administrative burden on shippers that they should not have to bear. Consequently, CP and these shippers ask that we impose a requirement that CN/WC must quote commercially reasonable contract through rates and charges at the request of a carrier that currently interchanges traffic with WC.

Applicants responded that they are willing and expect to work directly with connecting carriers to establish contract through rates. Specifically, applicants promise that “[i]f CP or some other connecting carrier proposes a through rate to the shipper or to Applicants, and the proposal elicits shipper interest in the form of a request to [applicants] to establish a contract through rate, our obligation is triggered, and we will deal with CP [or some other connecting carrier] if that is the shipper’s preference.” CN/WC-16 at 67 (footnote omitted). Applicants maintain that the requirement that there be a “request of a shipper” merely ensures that there is an underlying shipper request before applicants must undertake to construct a contract through rate. CN/WC states that the NITL/CN Agreement does not force shippers to negotiate separately with connecting carriers as well as CN/WC, does not preclude connecting carriers from taking a lead in the negotiations, and does not preclude a connecting carrier from proposing a through rate to a

²¹ Celgar, IMC Global, MC Forest, and Tembec.

²² Today, a shipper generally negotiates with only one of the carriers participating in an interline movement, most typically the originating carrier. The originating carrier, in turn, makes arrangements with the other railroad(s) involved in the movement.

shipper. And NITL apparently agrees with this interpretation of CN/WC's obligation under the agreement.²³ We will hold applicants to these representations.

Not content to rely upon its rights under the voluntary NITL/CN Agreement or applicants' open-gateways pledge, Vulcan has asked for conditions that would require the Board to regulate the terms and conditions under which specific gateways, such as Chicago, are to be preserved. We are disinclined to impose such conditions because they tend to be anticompetitive. Long ago, the Interstate Commerce Commission routinely imposed a condition requiring applicants, upon consummation of a merger, to freeze in place the existing through rates for each existing gateway. These so-called DT&I conditions²⁴ had anticompetitive consequences by precluding carriers from making route changes that improved efficiency and service and from establishing related rate reductions.²⁵ Rather, we prefer to allow a merged entity the flexibility to determine what routes are most efficient given the newly restructured system because shippers would benefit from this process. Nonetheless, we note that Vulcan and other shippers will be able to invoke the protections to which NITL and CN have voluntarily agreed.

WMC has requested a condition²⁶ that would, in effect, extend the NITL/CN Agreement to include the preservation of inactive gateways. We are disinclined to freeze the existing rail route structure in such an inefficient and arbitrary manner. Applicants have explained that WMC's other concerns with the application of the gateway preservation provisions of the NITL/CN Agreement are misplaced. For example, the language in the agreement dealing with a gateway that has been "active" during the prior 12-month period relates to all rail movements using the gateway, and not to its use by any specific shipper. Similarly, these gateway protections are not limited only to traffic moving between those origins and destinations that were involved in movements during the prior 12-month period, but instead apply to all traffic for

²³ Applicants stated that NITL agreed with applicants' interpretation of the NITL/CN Agreement. CN/WC-16 at 64.

²⁴ The conditions derive from Detroit, T. & I. R. Co. Control, 275 I.C.C. 455, 492-93 (1950).

²⁵ CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company — Control and Operating Leases/Agreements — Conrail, Inc. and Consolidated Rail Corporation, STB Finance Docket No. 33388, Decision No. 89 (STB served July 23, 1998), slip op. at 60-61.

²⁶ WMC has stated that its support for the CN/WC control transaction is unequivocal, and thus not subject to the Board's imposing any of the conditions it has requested.

which the rail movement begins or ends at “points on WC.”²⁷ The concerns of WMC are not well-founded.

Bottleneck Rule; Contract Exception. We will hold applicants to their bottleneck-waiver pledge that we quoted previously. DOT questions the effect of the NITL/CN Agreement discussed above on applicants’ bottleneck-waiver pledge, asking whether an arbitrator will be substituted for the Board in shipper challenges to bottleneck-segment rates. There is no reason to assume that the arbitration clause in the NITL/CN Agreement applies to these cases. We would not, however, object if a shipper and CN/WC agreed to arbitrate a bottleneck-segment rate dispute. But such an agreement would stand on its own, separate and apart from applicants’ bottleneck-waiver pledge.

Great Lakes Shipping Industry; Threat Of Diversion. The greatest controversy in this proceeding has been over the effect of the transaction on the shipping of taconite, a commodity mined largely in Minnesota and the Upper Peninsula of Michigan and used in making steel. The taconite mines at issue here are served exclusively by DM&IR, a GLT subsidiary. Historically, the taconite traffic has moved mostly by a less costly rail-water route using the Great Lakes. The all-rail routes around the lakes are typically used only during those months when the Lake Superior ports are closed. GLT initially opposed the transaction because of the fear that a combined CN/WC could use below-cost rates to divert taconite traffic to an all-rail route. GLT-19 at 2. GLT believed that such noncompensatory pricing on CN/WC’s part would significantly disrupt waterborne commerce on the Great Lakes, and that eventually CN/WC could gain and profit from enhanced market power over shipments of taconite.

In light of this fear of below-cost pricing, GLT has entered into an agreement with CN that has satisfied its concerns. Both GLT and applicants have asked us to impose the terms of the GLT/CN Agreement as a condition of approval of the transaction. GLT supports the application so long as the GLT/CN Agreement is imposed as a condition.

²⁷ See CN/WC-16 at 84-85.

We do not find GLT's below-cost pricing scenario at all realistic.²⁸ To the contrary, two of the largest taconite shippers, AK Steel and U.S. Steel, that would be significantly at risk if low-cost lake shipping were to be disrupted in the manner feared by GLT, have firmly stated that they are far more concerned with the ramifications of GLT's proposed remedy than with any harm to which it is addressed.²⁹ We find that there is no merger-related harm that need be addressed by the GLT/CN Agreement. Even if CN/WC were to engage in this highly unlikely

²⁸ We find GLT's concern over a long-term noncompensatory pricing campaign orchestrated by CN/WC to be the equivalent of a claim that applicants will apply a predatory pricing strategy to their post-transaction taconite movements. The Transportation Institute, representing U.S.-flag shipping companies providing services on the Great Lakes waterway system, has also explained that its "reservations about the pending CN-WC merger are not grounded in the fear of additional competition to the existing marine transportation system, but rather, in the very real threat of the potential for *unfair and predatory* competition." See Letter from James L. Henry, President, Transportation Institute, June 25, 2001 (emphasis in original). "Predation, as commonly understood, is the sacrifice of present revenues for the purpose of driving rivals out of a market and recouping the losses through higher profits earned in the absence of competition." Lawfulness of Vol. Discount Rates — Mot. Com. Car., 365 I.C.C. 711, 713-14 (1982). Predation is an inherently uncertain strategy, because even if a competitor does intentionally incur short-run losses, drive out competition, and then raise prices, it will be successful only if it can keep out of the market potential entrants eager to share some of the higher profits. Because it is rarely possible to keep out new competitors, "there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful." Matsushita Elec. Industrial Co. v. Zenith Radio, 475 U.S. 574, 589 (1986). Indeed, "without barriers to entry it would presumably be impossible to maintain supracompetitive prices for an extended time." Id. at 591 n.15.

²⁹ U.S. Steel has explained that, absent the GLT/CN Agreement, DM&IR has little of the market power associated with its position as the exclusive originating taconite carrier, because a long-term contract with GLT enables U.S. Steel to negotiate directly with the remaining railroads in the all-rail route. This agreement provides that DM&IR's division of joint line rates shall increase or decrease (subject to a minimum rate) in proportion to the rate changes negotiated by the other rail carriers participating in the movement. See USS-3, V.S. Efkenan at 16-17.

strategy of below-cost pricing, our statute³⁰ or the appropriate application of the antitrust laws provides a sufficient remedy.

DOT, NITL, AK Steel, and U.S. Steel contend that certain elements of the GLT/CN Agreement could prove to be anticompetitive and have asked us not to impose it as a condition of approval, which would convey immunity from the application of the antitrust laws.³¹ While we do not characterize this agreement as anticompetitive *per se*, these parties have raised sufficient doubts about certain elements of the GLT/CN Agreement that we are disinclined to impose its terms. In light of our finding that the agreement is not required to address any merger-related harm, we have determined that it would not be in the public interest to impose it. See, e.g., Canadian National Railway Company, Grand Trunk Corporation, and Grand Trunk Western Railroad Incorporated — Control — Illinois Central Corporation, Illinois Central Railroad Company, Chicago, Central and Pacific Railroad Company, and Cedar River Railroad Company, STB Finance Docket No. 33556, Decision No. 37 (STB served May 25, 1999) (CN/IC), slip op. at 32. We will, however, remain open to any complaints about below-cost pricing strategies should they arise.³²

GLT contends that, in view of the agreement, it refrained from presenting evidence it otherwise would have submitted. And it argues that not imposing the agreement as a condition would be unfair to GLT and would discourage future settlements. GLT-19 at 4. While we are not entirely unsympathetic to these arguments, and although we encourage settlements, we need

³⁰ See 49 U.S.C. 11327, which authorizes us to “make appropriate orders supplemental” to an order approving a transaction under section 11323. See also Coach USA, Inc. and KT Contract Service, Inc. — Control and Merger Exemption — Gray Line Tours of Southern Nevada, STB Finance Docket No. 33431 (STB served Aug. 29, 2001), slip op. at 2 (in an analogous context involving bus carriers, we evaluated a claim of predatory pricing that arose 2 years after approval of common control).

³¹ NITL states that, “[a]s a policy matter, the League believes that the Board should not acquiesce in or approve arrangements by which one competitor is given direct or indirect control over the pricing of another. Such an arrangement may result in the diminishment of competition, to the detriment of the shipping public.” NITL Reply Comments at 2. Similarly, DOT states that “the settlement should be freestanding and subject to the antitrust laws like other contractual arrangements between competitors, and the Applicants and GLT should decide whether they wish to proceed with it on that basis.” DOT-3 at 7.

³² This is consistent with DOT’s position that, rather than a formal oversight proceeding of the type associated with recently approved consolidations of Class I railroads, we monitor developments by inviting parties to submit evidence of any harms to Great Lakes water transportation caused by this transaction. See DOT-3 at 6.

not impose them if they are not required to address a harm that arises because of the transaction we approve. See CN/IC, slip op. at 32. And, as we have already indicated, legitimate concerns have been raised about whether every element of this agreement is in the public interest.

Portions of the agreement do appear to have the potential to further the public interest, such as the joint arrangement to provide for DM&IR-WC movements of taconite to the port of Escanaba³³ and the provisions for better operational coordination between those two railroads and CN in joint service. Thus, while we will not impose the GLT/CN Agreement as a condition, neither will we forbid applicants from entering into an agreement with GLT similar to the one before us here.

AK Steel's B&LE Abandonment Condition. B&LE is a railroad within the GLT system. GLT initially argued in this proceeding that, if a combined CN/WC were to divert a substantial amount of taconite from rail-water movements, it could have such a deleterious effect that B&LE might have to abandon the southern portion of its line, which serves AK Steel's facility in Butler, PA. See GLT Reply dated Apr. 30, 2001 at 10-11. GLT subsequently withdrew this assertion.³⁴

AK Steel asks us to impose a condition requiring GLT to "adhere" to a representation that it would not seek to abandon service to the Butler facility. But GLT did not make that representation. Rather, GLT indicated that it would not argue that diversion of taconite would cause it to abandon B&LE's service to Butler. GLT has lived up to the representation it made.

The diversion of taconite traffic to all-rail movements is highly unlikely to occur because of the inherent cost advantages of rail-water movements. Thus, even if GLT were to seek to abandon its service to Butler at some point in the future, it is not likely that it would be the result of the transaction we are here approving. As the requested no-abandonment condition is not designed to address a harm that would arise from the consummation of this transaction, we will not impose the condition (even assuming that we could place a condition on a non-applicant such as GLT).

Canadian Pacific's Green Bay Haulage Condition. In 1993, CP entered into an agreement by which WC would haul CP intermodal traffic moving between Green Bay and certain points in

³³ The port of Escanaba, located on Lake Michigan, can be used in winter when the Lake Superior ports are not available for shipments to the lower lakes because of the closing of the locks between Lakes Superior and Huron. See USS-3, Part II at 6.

³⁴ GLT stated its new position: "even if there were substantial diversions of taconite traffic to all-rail, B&LE would continue to serve customers on the southern part of its line. Thus, [GLT] no longer expects to argue that AK Steel and other shippers on the southern part of the B&LE line are likely to lose rail service if the merger is approved." GLT-10 at 5.

the Northeastern United States on the Delaware & Hudson, a CP affiliate. The agreement may be canceled on 90 days' notice from either party. See CN/WC-16 at 69. Although CP has not moved any traffic under this agreement for about 7 years, it nevertheless asks us to condition approval of the transaction on applicants' agreeing not to cancel the haulage agreement for 20 years. According to CP, this agreement preserves the only rail-to-rail direct competition at Green Bay.

An option that has not been used in 7 years appears to be "competitive" only in the most theoretical sense. In any event, CP has not argued, let alone demonstrated, that the combined CN/WC would be more likely to cancel the agreement than would WC acting alone. DOT has noted that the haulage agreement is unrelated to the merger, and that the terms of the NITL/CN Agreement and applicants' own waiver of defenses in "contract exception" cases (the bottleneck-waiver pledge) should address the specific concerns of shippers that would otherwise benefit from this haulage agreement. DOT-3 at 9. Because the condition sought by CP does not address any harm arising from the approval of this transaction, we will not impose it.

Vulcan's Port Edwards Switching Condition. Vulcan, a chemical manufacturer, has a plant at Port Edwards, WI, that is served by WC and, through a reciprocal switching arrangement, by UP. According to Vulcan, the level of the switching fee effectively determines whether it has rail service from two carriers or from one. VUL-2 at 2-3. The current agreement, which took effect in December 2000 and expires in December 2005, provides that any escalation in WC's current \$300-per-car charge may occur only "in proportion to the escalation of reciprocal switch charges published by the UP for provision of services to WC." CN/WC-16 at 74. Vulcan seeks a condition, to take effect after December 2005, that would allow the switching fee to be increased "only to reflect cost increases in performing those switching services." VUL-2 at 3.

DOT notes that "this is another instance in which there is no basis to override the bargain struck by the parties." DOT-3 at 10. WC had no obligation to enter into the reciprocal switching agreement, just as CN/WC in the future would have no such obligation. Vulcan has offered no reasons why the combined CN/WC would be inclined to treat the reciprocal switching arrangement at Port Edwards any differently than WC alone. Thus, the proposed condition is not aimed at reducing a harm caused by the transaction, and we will not impose it. We will, however, hold applicants to their representation that they will honor the existing contractual switching arrangement that is now in effect at Vulcan's Port Edwards plant. See CN/WC-16 at 74.

Service Assurance And Operational Monitoring. Applicants have indicated that the CN/WC control transaction is essentially end-to-end and will result in few facility rationalizations or changes in rail operations, and the Board has agreed to consider it a minor transaction. Nevertheless, because there are planned operational changes as WC becomes an

operating division of CN, there will be service assurance and integration issues that should be addressed through limited operational monitoring.

As in prior transactions, operational monitoring will be the responsibility of the Board's Office of Compliance and Enforcement (OCE). We will require applicants to file all reports with OCE and we will have OCE's Director report to us on the results of the monitoring and whether, on request or on his own initiative, required reporting should be extended, expanded, or reduced. Each reporting sequence should be accompanied by a cover letter addressed to the Director of OCE that discusses the attached report(s) and explains any unusual events. It is expected that CN/WC will use the cover letter to report on its continued activity with the Chicago Planning Group and the Chicago Transportation Coordination Office (CTCO) so that issues affecting the Chicago terminal can continue to receive immediate attention.

Applicants have recognized that, even with a minor transaction, there is a need to assure the Board that service is not compromised, particularly during the implementation of the transaction. With this in mind, applicants have provided a Service Assurance Plan, usually required for major transactions, to assure the Board and affected shippers that all aspects of the implementation planning process have been fully considered. Applicants have stated that there will be minimal rerouting of traffic, and that the net increase in traffic, even in Chicago, will not exceed 1.77 trains per day. However, there are possible changes in certain corridor operations, in the distribution and allocation of WC equipment, and in the integration of CN's Information Technology (IT) systems and customer service procedures on WC that we believe should be addressed through operational monitoring reports.

To ensure that this monitoring is sufficient but not unnecessarily burdensome to CN/WC, considering the minor nature of this transaction, we will begin monitoring on "day one,"³⁵ and we will require applicants to file reports for a 1-year period as specified below. If implementation of the transaction is not complete by 1 year from "day one," certain aspects of the reporting may be continued. Monitoring reports received by OCE will be placed in the public docket and on the Board's web site.

Equipment Allocation and Distribution Report. We intend this to be a one-time reporting filed with OCE, indicating any changes in WC's allocation, distribution, or assignment of the WC equipment fleet, including locomotives. The report should identify the equipment fleet generally, in terms of the type and number of equipment units with WC or affiliated marks, and specifically in terms of the equipment that will be utilized in other services or removed from a particular shipper's assignment. Because WC has a sizeable fleet of "high quality" boxcars used principally for paper, an important commodity in Canada and on WC, this reporting should emphasize changes with respect to that car type. Accordingly, the equipment report should

³⁵ By "day one," we mean the date that applicants begin consolidated operations.

identify the equipment which will be transferred from WC to other components of CN, and whether customers' boxcar or other equipment assignments or distribution patterns will change significantly as a result. The report should also describe how current WC customer demands will be met with the WC locomotive fleet or through the use of power provided by CN.

Information Technology Systems Integration and Customer Service. CN and WC presently utilize different IT operations systems, and, based on CN's stated intention to consolidate WC into CN's systems, it will be important for the Board to receive reports on the proposed cutover to CN's Service Reliability Strategy (SRS) and other systems, the date(s) for such cutover(s), and progress reporting on the successful completion. We note from the application that it may be 12 to 18 months before WC is converted from its Transportation Control System (TCS) to SRS. And while we recognize that the CN/IC conversion went relatively smoothly, it was not totally without problems. Therefore, the required IT reporting should reaffirm proposed schedules so that the Board, the shipping public, and employees can be adequately informed on the specific timetable for system conversions and on information related to the use of new systems. It will also be necessary for the Board to receive periodic progress reports (no less than monthly) during the conversion period. Considering the importance of good communication, included with this reporting should be an indication of how and where customers experiencing problems should communicate their problems to ensure prompt resolution. Applicants should consult with the Director of OCE regarding the timing for filing these IT reports.

Benchmarking and Performance Data. CN has promised WC shippers that service levels will be the same or improved. In order to verify system service levels, reporting of corridor-level data will be necessary. Such data should be represented in the form of benchmarks to establish historic and post-transaction baselines for major corridor and commodity flows. The minimum for historical benchmarking will be the 12 monthly periods ending 90 days prior to "day one." Actual performance data will begin on "day one." The necessary benchmarks will consist of route-level performance information for major WC traffic flows. The data should be filed in the same manner as other required reporting, but using a matrix structure that provides both the historical benchmark data and the actual performance data during the monitoring period, and reflect flow volumes (carloads) and average elapsed time for loaded movements. These benchmark and performance data reports must be filed on a monthly basis for a 1-year period beginning 60 days after "day one."

Yard And Terminal Operations. In their application, CN and WC have indicated the principal classification yards and terminals that they believe will be affected by the CN/WC control transaction, and have further indicated that both companies are equipped to monitor terminal performance and inventories. Applicants have also indicated their intention to continue to publish Class I performance measures each week on the website of the Association of American Railroads (AAR). Therefore, in addition to the performance measures currently reported through the AAR, CN/WC will be expected to expand its reporting of average terminal

dwell time to include those principal classification yards and terminals discussed in the application as being affected by the transaction. Such expanded reporting through AAR would eliminate the need for additional or separate reporting to the Board during the monitoring period.

Labor Protection. Under 49 U.S.C. 11326 (with exceptions not pertinent here), the imposition of labor protection is mandatory when approval is sought for a transaction under §§ 11324 and 11325. In the absence of a need for greater protection, the conditions in New York Dock Ry. — Control — Brooklyn Eastern Dist., 360 I.C.C. 60 (1979) are appropriate for this type of transaction. Because no need for greater protection has been shown (the evidence indicates that the CN/WC control transaction will be implemented with only minor workforce reductions), these conditions will be imposed here.

The Brotherhood of Maintenance of Way Employees (BMWE) seeks additional guidance about who would bargain on behalf of nonunionized WC employees concerning the implementation of the New York Dock conditions. Article I, § 4 of those conditions establishes a procedural mechanism to govern the creation of implementing agreements with respect to merger-related “transactions” that “may cause the dismissal or displacement of any employees, or rearrangement of forces.” New York Dock, 360 I.C.C. at 85. We recognize that this procedural mechanism (negotiation if possible; arbitration if necessary) was designed with organized labor in mind. But the mechanism applies also to employees who are not represented by a union. With respect to non-union employees, the term “representative,” as used in Article I, § 4, “means any individual or organization the employees select to represent them in the negotiation of an implementing agreement, or if they do not so choose, the employees themselves.” Fox Valley & Western Ltd. — Exempt., Acq. and Oper., 9 I.C.C.2d 272, 280 (1993).

ARU (composed of four labor unions) asks us, as a condition of approval of the transaction, to impose the terms of two recent agreements reached between many of the large railroads and most of the labor unions that represent railroad employees. These agreements provide a framework to resolve differences between collective bargaining agreements (CBAs) when the workforces of formerly separate carriers are combined into one, and, in so doing, address the override of CBAs that, under our conditions, could occur when implementing agreements to allow consolidations to proceed cannot be reached. See Major Rail Consolidation Procedures, slip op. at 220-21 and 226-27.

We strongly support the recent agreements reached by the majority of the large railroads and their labor unions, but we see no basis on this record for imposing them on applicants here. As we have noted, there will be only minor workforce reductions as a result of the transaction, and applicants have committed “to achieve necessary work organization changes through voluntary, mutually acceptable agreements,” CN/WC-16 at 11. This should go far toward avoiding the type of “cramdown” that ARU fears could occur. And in the unlikely event that agreements are not reached voluntarily, we remind the parties that in this transaction, as in major rail consolidations, we will “respect[] the sanctity of collective bargaining agreements and will

look with extreme disfavor on overrides of collective bargaining agreements except to the very limited extent necessary to carry out an approved transaction.” 49 U.S.C. 1180.1(e); Major Rail Consolidation Procedures, slip op. at 32.³⁶

Finally, as concerns labor protection, we address the request of several parties (IAMAW, IBEW, and ARU) that have asked us to hold applicants for the indefinite future to a representation they made in a discovery submission, CN/WC-8. There applicants stated that, as part of the CN/WC control transaction, they “do not have any current plan or intention” to transfer certain mechanical work or mechanical positions from CN facilities to WC facilities or vice versa, or to abolish any mechanical positions at any CN mechanical facility. Although applicants have stated their current intentions, they have not represented that, in implementing the transaction, they will never transfer or abolish any such work or positions. We see no purpose to requiring applicants to adhere to their statement of current intentions for the indefinite future.

Fairness Determination. Applicants’ financial advisors, Salomon Smith Barney Inc. (for CN) and Goldman, Sachs & Co. (for WC), have employed various valuation techniques to determine the fairness — to the shareholders of CNR and WCTC, respectively — of the terms of the purchase of the outstanding common stock of WCTC. See CN/WC-2, Vol. 1 at 118-19 (the Salomon Smith Barney analysis) and 133-42 (the Goldman, Sachs analysis). No party has challenged this evidence. These investment firms, which have substantial expertise in the valuation of businesses and securities in connection with mergers and acquisitions, have found that the consideration to be paid for the WCTC common stock will be fair to the shareholders of CNR and to the shareholders of WCTC. After carefully reviewing the arguments and conclusions of these investment firms, we find that the terms under which CNR will acquire indirect ownership of the common stock of WCTC are just and reasonable to the shareholders of CNR and to the shareholders of WCTC.

Environmental Issues. The National Environmental Policy Act (NEPA), 42 U.S.C. 4321-43, generally requires federal agencies to consider “to the fullest extent possible” environmental consequences “in every recommendation or report on major federal actions significantly affecting the quality of the human environment.” 42 U.S.C. 4332(2)(C). Under both the regulations of the President’s Council on Environmental Quality implementing NEPA and our own environmental rules, actions are separated into three classes that prescribe the level of documentation required in the NEPA process. Actions that may significantly affect the

³⁶ CN will be required to adhere to its representation (set out in a letter dated August 30, 2001, which was entered into the record as an attachment to UTU’s supplemental comments filed September 4, 2001) that CN “will not use New York Dock processes to replace any existing CN/IC UTU agreements with the agreement between the Wisconsin Central and the UTU.” Based on this representation, UTU fully supports the CN/WC control transaction.

environment generally require the preparation of a full Environmental Impact Statement (EIS).³⁷ Actions that may or may not have a significant impact ordinarily require the preparation of a more limited Environmental Assessment (EA).³⁸ Finally, actions whose environmental effects are ordinarily insignificant may be “categorically excluded” from NEPA review across the board, without a case-by-case review.³⁹

Applicants asserted in their application that the CN/WC control transaction will have insignificant environmental effects and will cause only modest changes in carrier operations, none of which will exceed the thresholds triggering environmental review established in our environmental rules at 49 CFR 1105.7(e)(4), (5), and 49 CFR 1105.6(c)(2)(i).⁴⁰ Applicants further argued that this transaction is exempt from historic review under the National Historic Preservation Act (NHPA).

To assist us in determining whether to conduct a formal environmental review, we directed applicants to prepare an Environmental Appendix providing additional details and explanation.⁴¹ Consistent with other recent railroad merger cases, applicants also worked with the Federal Railroad Administration (FRA) to develop a detailed Safety Integration Plan (SIP), under FRA guidelines, addressing safety integration concerns. The SIP outlines applicants’ plans for safe integration of their rail lines, equipment, personnel, and operating practices. Because safety integration is an ongoing process, the SIP may be modified and refined as this transaction

³⁷ 40 CFR 1501.4(a)(1); 49 CFR 1105.4(f), 1105.6(a)(1).

³⁸ 40 CFR 1501.4(c); 49 CFR 1105.4(d), 1105.6(b).

³⁹ 40 CFR 1500.4(p), 1501.4(a)(2), 1508.4; 49 CFR 1105.6(c). An agency’s procedures for categorical exclusions “shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect, thus requiring an EA or an EIS.” 40 CFR 1508.4. See 49 CFR 1105.6(d). But absent extraordinary circumstances, once a project is found to fit within a categorical exclusion, no further NEPA procedures are warranted.

⁴⁰ Applicants noted that this is an entirely end-to-end coupling of the existing CN and WC systems with no overlapping or parallel routes, and that there will be no rail line abandonments or construction projects related to the transaction.

⁴¹ In Decision No. 2 (served May 9, 2001), we directed applicants to make the Environmental Appendix available for public review and comment to ensure that the affected public, including government agencies and communities, had an opportunity to raise any environmental concerns.

moves forward. The Board and FRA also have entered into a Memorandum of Understanding (MOU), with the concurrence of DOT, regarding the ongoing safety integration process.⁴²

We received 16 comments on the Environmental Appendix and the SIP.⁴³ In Decision No. 9 (served August 2, 2001), we found, based on the recommendation of the Section of Environmental Analysis (SEA) and our review of the available information, including applicants' Environmental Appendix and the comments, that there is no need for a formal environmental review under NEPA here, and that this transaction is "categorically excluded" from environmental analysis under 49 CFR 1105.6(c)(2)(i). As we explained, no EA or EIS is warranted because the transaction will cause no more than minor increases in traffic on any line segment, and, based on the information before us, there is nothing to indicate that the transaction has any potential for significant environmental impacts. The transaction also is exempt from historic review under NHPA pursuant to 49 CFR 1105.8(b)(1), (3).

In Decision No. 9, we stated that we would address in this decision SEA's recommended mitigation. SEA recommended that, even if no EA or EIS is warranted, we impose conditions requiring applicants to comply with the SIP and to participate and fully cooperate in the ongoing activities related to the MOU. We agree with SEA and will impose both of SEA's recommended conditions.

Certain other issues raised in the comments to the Environmental Appendix also warrant our consideration here. In particular, GLT and certain communities have expressed concerns that significant volumes of taconite (a form of iron ore) could switch from rail-water movements to all-rail routings using rail lines of CN and WC. But as we found in Decision No. 9, GLT and the other commenters made only generalized assertions that all-rail movements of the taconite traffic could affect noise, air, safety, and emergency services in communities through which this traffic would pass.⁴⁴ Moreover, we are skeptical that the substantial traffic shifts posited by GLT and

⁴² To facilitate public review and comment on this important issue, the Environmental Appendix included the complete SIP and the MOU.

⁴³ Comments were filed by government agencies, communities, commercial entities, and applicants.

⁴⁴ The Village of Buffalo Grove, IL, also expressed concerns about increases in commuter train traffic through the community and the sounding of horns at grade crossings. Other commenters expressed concerns about increased traffic and the need to upgrade crossing protection. But the traffic increases on WC and CN lines as a result of this merger will be minimal. Also, as applicants state (CN/WC-16 at 13-14 n.13 & 14), the increases in commuter train traffic were planned independent of the transaction and the Village failed to explain any
(continued...)

the communities will actually occur, at least in the foreseeable future, if ever. DOT and applicants have indicated that rail-water shipping of taconite has considerable cost advantages, that all-rail taconite movements in the Great Lakes area historically have been competitive only when the Upper Great Lakes are closed to shipping because of weather, and that DM&IR has a contract to ship taconite by rail-water shipping for the next 5 years.⁴⁵ In these circumstances, we reaffirm our determination in Decision No. 9 that no need has been shown for a formal environmental review in this case.

While DOT agreed that “adverse environmental or community consequences arising from the merger are unlikely,”⁴⁶ DOT and others have suggested that affected communities and others be given up to 3 years to demonstrate significant adverse environmental impacts. We do not believe that a condition imposing an environmental oversight period is warranted here, however, given the absence of any showing that this transaction will have significant environmental effects or that an EA or an EIS should be prepared.⁴⁷ As in any other case, affected communities and others can seek redress in the future, if appropriate, by filing a petition to reopen alleging changed circumstances, new evidence, or material error. See 49 CFR 1115.4.

This transaction also raises no significant issues regarding safety.⁴⁸ As we explained in Decision No. 9, DOT has noted that FRA is concerned that the SIP would permit applicants to move WC’s rail dispatching operations from the United States to Canada.⁴⁹ But as DOT points out,⁵⁰ the SIP specifically provides (at p. 61) that applicants would consult with FRA prior to any such transfer. Thus, DOT in its most recent filing urges only that we hold applicants to their

⁴⁴(...continued)

possible connection between its stated concerns about the sounding of horns and the CN/WC control transaction.

⁴⁵ See DOT-3 at 5; CN/WC-13 at 2 and Appendix I; CN/WC-16 at 13 n.13, 21-26.

⁴⁶ DOT-1 at 5.

⁴⁷ Indeed, in its most recent filing, DOT seeks only a statement that we will monitor developments, not imposition of an environmental oversight period condition. See DOT-3 at 2, 10-11.

⁴⁸ Applicants’ SIP received no opposition, and DOT has specifically stated (DOT-1 at 5) that the SIP is satisfactory as respects the implementation process now envisioned. SEA also reviewed the SIP.

⁴⁹ DOT-1 at 3-5; DOT-3 at 2.

⁵⁰ DOT-1 at 4.

representation to consult with FRA in advance of any possible transfer of dispatchers out of the United States.⁵¹ We will do so by imposing SEA's recommended conditions requiring applicants to comply with their SIP, and to participate and fully cooperate in the ongoing activities with FRA and the Board related to the MOU until FRA advises us that the transaction has been safely implemented.⁵²

Based on the record, we find:

1. The acquisition of control by Canadian National Railway Company and Grand Trunk Corporation of Wisconsin Central Transportation Corporation and its U.S. rail carrier subsidiaries (Wisconsin Central Ltd., Fox Valley & Western Ltd., Sault Ste. Marie Bridge Company, and Wisconsin Chicago Link Ltd.) will not substantially lessen competition, create a monopoly, or restrain trade in freight surface transportation in any region of the United States.

2. This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The proposed acquisition of control by Canadian National Railway Company and Grand Trunk Corporation of Wisconsin Central Transportation Corporation and its U.S. rail carrier subsidiaries (Wisconsin Central Ltd., Fox Valley & Western Ltd., Sault Ste. Marie Bridge Company, and Wisconsin Chicago Link Ltd.) is approved, subject to the imposition of the conditions discussed in this decision.

2. Applicants must comply with all of the conditions imposed in this decision, whether or not such conditions are specifically referenced in these ordering paragraphs.

3. Applicants must adhere to their representation that a unified CN/WC will not engage in "vertical foreclosure" by closing efficient gateways, CN/WC-2, Vol. 1 at 14 n.13, but, rather, "will keep all existing active gateways affected by the Transaction open on commercially reasonable terms." CN/WC-2, Vol. 1 at 14 and 150.

⁵¹ DOT-3 at 2.

⁵² Our final environmental conditions will require applicants: (1) to comply with the SIP, which may be modified and updated as necessary to respond to evolving conditions; and (2) to participate and fully cooperate with the ongoing regulatory activities associated with the safety integration process, as described in the MOU agreed to by the Board and FRA, with the concurrence of DOT, until FRA affirms to the Board in writing that the integration of applicants' systems has been completed safely and satisfactorily.

4. Applicants must adhere to their representation that they will “waive any defenses they might otherwise have as a result of the Transaction, under the Board’s general rule that it does not separately regulate bottleneck rates, in circumstances where a shipper prior to the Transaction would have been entitled to regulation of a bottleneck rate under the Board’s ‘contract exception’ to the general rule.” CN/WC-2, Vol. 1 at 14.

5. Applicants must adhere to all of the representations they made on the record during the course of this proceeding, whether or not such representations are specifically referenced in this decision.

6. Applicants must comply with the operational monitoring condition imposed in this decision, and, in connection therewith, must file the reports discussed in this decision.

7. Applicants shall comply with the Safety Integration Plan, which may be modified and updated as necessary to respond to evolving conditions.

8. Applicants shall participate and fully cooperate with the ongoing regulatory activities associated with the safety integration process, as described in the Memorandum of Understanding agreed to by the Surface Transportation Board and the Federal Railroad Administration, with the concurrence of the Department of Transportation, until the Federal Railroad Administration affirms to the Surface Transportation Board in writing that the integration of applicants’ systems has been completed safely and satisfactorily.

9. Approval of the CN/WC control application is subject to the conditions for the protection of railroad employees described in New York Dock Ry. — Control — Brooklyn Eastern Dist., 360 I.C.C. 60 (1979).

10. Any condition that was requested by any party in the STB Finance Docket No. 34000 proceeding but that has not been specifically approved in this decision is denied.

11. This decision shall be effective on October 7, 2001.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.
Commissioner Burkes commented with the following separate expression.

Vernon A. Williams
Secretary

Commissioner Burkes, commenting:

The Board has thoroughly and carefully examined the evidence in this proceeding, while handling this merger application quickly. This case demonstrates that the Board can respond expeditiously to the activities of the private marketplace without sacrificing its regulatory responsibilities.

The Board will be closely monitoring the implementation of this transaction and the integration of the operations of the merged carriers. Safety, of course, is of particular importance. We are requiring applicants to comply with their Safety Integration Plan (SIP) and to fully cooperate in ongoing Federal Railroad Administration (FRA) and Board activities regarding the safety integration process as provided in the Board's Memorandum of Understanding with FRA. We are also requiring applicants to report for one year on the progress of the integration of their operations.

I am pleased that the applicants provided a Service Assurance Plan (SAP), to assure the Board and affected shippers that all aspects of the implementation planning process have been fully considered. CN and WC have had good experience working together in the past and anticipate smooth implementation of the merger.

The evidence presented to the Board in this proceeding shows that this transaction will not harm competition. In fact, the evidence shows that this is a pro-competitive, basically end-to-end transaction that will lead to increased efficiencies and new or improved services offerings for shippers. A large number of shippers, including the National Industrial Transportation League, support this transaction. According to applicants, no shipper currently receiving rail service from either CN or WC will experience either a 2-to-1 or 3-to-2 reduction in the number of independent railroads providing service to the shipper as a result of this transaction.

In addition, the Board is imposing a condition holding applicants to their representations that the unified CN/WC will keep open, on commercially reasonable terms, all existing active gateways affected by the transaction. The Board is also requiring applicants to waive defenses they might otherwise have as a result of this merger under our "bottleneck rates" policy.

The impact of this transaction on labor is expected to be relatively minor, but we are imposing the New York Dock labor protective conditions on the transaction to provide appropriate protection for any employees that are affected.

APPENDIX A: ABBREVIATIONS

AAR	Association of American Railroads
AB	Alberta
ACRI	Algoma Central Railway, Inc.
AK Steel	AK Steel Corporation
Amtrak	National Railroad Passenger Corporation
ARU	Allied Rail Unions (BRS, IBB, NCFO, and SMW)
ATDD	American Train Dispatchers Department of the Brotherhood of Locomotive Engineers
BC	British Columbia
BLE	Brotherhood of Locomotive Engineers
BMWE	Brotherhood of Maintenance of Way Employes
BNSF	The Burlington Northern and Santa Fe Railway Company
Board	Surface Transportation Board
BPRR	Buffalo & Pittsburgh Railroad Company
BRS	Brotherhood of Railroad Signalmen
B&LE	Bessemer and Lake Erie Railroad Company
CBA	collective bargaining agreement
CCP	Chicago, Central & Pacific Railroad Company
Celgar	Celgar Pulp Company
CFR	Code of Federal Regulations
CN	Canadian National (CNR, GTC, and Merger Sub, and their wholly owned subsidiaries, including GTW, DWP, SCTC, IC, CCP, CRRC, and WRC)
CNR	Canadian National Railway Company
CP	Canadian Pacific (CPR, Soo, D&H, and St.L&H)
CPR	Canadian Pacific Railway Company
CRRC	Cedar River Railroad Company
CSX	CSX Corporation and CSX Transportation, Inc.
CTCO	Chicago Transportation Coordination Office
DM&IR	Duluth, Missabe, and Iron Range Railroad Company
DOT	U.S. Department of Transportation
DT&I	Detroit, Toledo & Ironton Railroad Company
DWP	Duluth, Winnipeg & Pacific Railway Company
D&H	Delaware and Hudson Railway Company, Inc.
EA	Environmental Assessment
EIS	Environmental Impact Statement
EJ&E	Elgin, Joliet and Eastern Railway Company
E&LS	Esanaba & Lake Superior Railroad Company
FR	Federal Register
FRA	Federal Railroad Administration

FVW	Fox Valley & Western Ltd.
GLT	Great Lakes Transportation LLC
GPC	Georgia Pacific Corporation
GTC	Grand Trunk Corporation
GTW	Grand Trunk Western Railroad Incorporated
IAMAW	International Association of Machinists and Aerospace Workers
IBB	International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers
IBEW	International Brotherhood of Electrical Workers
IC	Illinois Central Railroad Company
IDOT	Illinois Department of Transportation
IMC Global	IMC Global, Inc.
KCS	The Kansas City Southern Railway Company
MB	Manitoba
MC Forest	MC Forest Products Inc.
Merger Sub	WC Merger Sub, Inc.
MKC	McKeesport Connecting Railroad
MOU	Memorandum of Understanding
NAFTA	North American Free Trade Agreement
NCFO	National Council of Firemen and Oilers/SEIU
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
NITL	The National Industrial Transportation League
NS	Norfolk Southern (Norfolk Southern Corporation and Norfolk Southern Railway Company)
NS	Nova Scotia
OCE	Office of Compliance and Enforcement
ON	Ontario
ONDEO Nalco	ONDEO Nalco Company
PRB	Powder River Basin
P&C Dock	Pittsburgh & Conneaut Dock Company
P&G	The Procter & Gamble Company
RailAmerica	RailAmerica, Inc.
RCAF-U	Unadjusted Rail Cost Adjustment Factor
SCTC	St. Clair Tunnel Company
SIP	Safety Integration Plan
SK	Saskatchewan
SMW	Sheet Metal Workers International Association
Soo	Soo Line Railroad Company
SRS	Service Reliability Strategy
SSMB	Sault Ste. Marie Bridge Company
STB	Surface Transportation Board

St.L&H	St. Lawrence and Hudson Railway Company Limited
TCS	Transportation Control System
Tembec	Tembec Inc.
TFM	Transportación Ferroviaria Mexicana, S.A. de C.V.
UP	Union Pacific (Union Pacific Corporation and Union Pacific Railroad Company)
URR	Union Railroad
USCPTA	U.S. Clay Producers Traffic Association, Inc.
USDA	U.S. Department of Agriculture
USS Fleet	USS Great Lakes Fleet, Inc.
UTU	United Transportation Union
U.S. Steel	United States Steel LLC
Vulcan	Vulcan Chemicals
WC	Wisconsin Central (WCTC, WCL, FVW, SSMB, WCLL, and ACRI)
WCL	Wisconsin Central Ltd.
WCLL	Wisconsin Chicago Link Ltd.
WCTC	Wisconsin Central Transportation Corporation
WisDOT	Wisconsin Department of Transportation
WMC	Wisconsin Manufacturers & Commerce
WPS	Wisconsin Public Service Corporation
WRC	Waterloo Railway Company
W&LE	Wheeling and Lake Erie Railroad

APPENDIX B: SHIPPER PARTIES

National Industrial Transportation League. NITL, an organization of shippers and groups and associations of shippers conducting industrial and/or commercial enterprises in all States of the Union and internationally, contends that the arrangements that have been agreed to by NITL and CN — in particular, the Bottleneck Rates Representation Condition and the various provisions contained in the NITL/CN Agreement — meet the major concerns of rail customers that might be affected by the CN/WC control transaction. NITL further contends that, in view of the CN commitments reflected in the Bottleneck Rates Representation Condition and the NITL/CN Agreement (commitments, NITL explains, that will protect NITL members and other rail shippers from any anticompetitive effects that might arise as a result of the CN/WC control transaction), the CN/WC control application should be approved, subject to the Bottleneck Rates Representation Condition.

The Bottleneck Rates Representation Condition. By letter dated April 25, 2001 (a copy of which has been entered into the record as Attachment 2 to NITL's comments filed April 27, 2001), CN has pledged that, upon the execution by NITL of the NITL/CN Agreement and the acceptance by the Board of the CN/WC control application as one for approval of a minor transaction, CN will request that the Board impose on approval of that transaction a condition requiring CN/WC to adhere to the following representation made in the CN/WC control application (see CN/WC-2, Vol. 1 at 14): "Applicants will also waive any defenses they might otherwise have as a result of the Transaction, under the Board's general rule that it does not separately regulate bottleneck rates, in circumstances where a shipper prior to the Transaction would have been entitled to regulation of a bottleneck rate under the Board's 'contract exception' to the general rule."

The NITL/CN Agreement. The NITL/CN Agreement (a copy of which has been entered into the record as Attachment 1 to NITL's comments filed April 27, 2001), which is intended to benefit (as a third-party beneficiary) every shipper or receiver of property on CN and/or WC (the NITL/CN Agreement refers to every such shipper or receiver as a "Shipper"), will apply if and when the CN/WC control transaction is consummated. The NITL/CN Agreement's key provisions concern service protection, interchange protection, and dispute resolution.

Service Protection Provisions. The NITL/CN Agreement provides that, upon the request of any Shipper, CN/WC shall make a good faith offer to enter into an agreement with that Shipper with respect to that Shipper's traffic affected by the CN/WC control transaction that, at a minimum: (a) identifies that Shipper's base service level as the average transit time during each base period (i.e., the 12 calendar months preceding the month in which the transaction is consummated, or such other time period agreed to by CN/WC and the Shipper) for each of the commodities shipped or received by that Shipper between each pertinent origin/destination pair affected by the transaction; (b) assures that average transit time at the base service level will not be adversely affected by the transaction; (c) provides that, if the Shipper notifies CN that the

Shipper's average transit time for any post-transaction calendar month has been adversely affected relative to that Shipper's average transit time for the corresponding base period calendar month, CN will have not more than 30 days to bring the average transit time for the movement(s) in question up to the base service level for the corresponding base calendar month; (d1) provides remedies (which will include, at a minimum, on-the-ground management flexibility and top-level backing with whatever resources are necessary to effect a complete and timely resolution) if the Shipper's average monthly transit time continues to be adversely affected by the transaction for more than 30 days after the date of notification to CN; (d2) provides that, during the 2-year period after consummation of the transaction, if a Shipper's average transit time calculated over a calendar month for a particular movement exceeds that for the corresponding base period calendar month, CN/WC shall have the burden of showing that the adverse effect was not a result of the transaction; (e) provides that CN/WC and the Shipper may agree upon a sliding scale of charges based on CN/WC's post-transaction performance for that Shipper relative to that Shipper's base service levels; and (f) provides that, unless otherwise agreed to by CN/WC and the Shipper, any agreement made pursuant to the service protection provisions of the NITL/CN Agreement will expire 5 years after the consummation of the transaction.

Interchange Protection Provisions. The NITL/CN Agreement provides: (a) that, at the request of a Shipper, and subject to any necessary concurrence of CN/WC's connections, CN/WC will establish and maintain in effect commercially reasonable contract through rates and charges that are applicable to the transportation of property for that Shipper originating on or destined to points on WC over any existing interchange between WC and any other rail carrier that was active during the 12 months prior to the date of the NITL/CN agreement (i.e., April 27, 2001); (b1) that, within the 5-year period subsequent to the consummation of the transaction, CN/WC will not (except as noted below) increase its portion of common carrier through rates that are in effect upon the date of consummation of the transaction and that are applicable to the transportation of property via interchanges to or from origin or destination points on WC and that have been used to ship the commodity in question in the prior 12 months; (b2) that, however, CN/WC's portion of such existing common carrier through rates may be increased by no more than the change, if any, in the Unadjusted Rail Cost Adjustment Factor (RCAF-U), or, if CN/WC so chooses, the change in the RCAF-U minus any fuel cost element of the RCAF-U plus any cost-based fuel surcharge applied by CN/WC; and (c) that, after the expiration of the 5-year period subsequent to the consummation of the transaction, CN/WC will not close, by any commercially unreasonable means, any interchange between WC and any other rail carrier then in active use.

Dispute Resolution Provisions. The NITL/CN Agreement provides: (a) that, if a dispute arises under the NITL/CN Agreement or under any agreement formed pursuant to the NITL/CN Agreement, the exclusive means by which any party to or beneficiary of the NITL/CN Agreement or any agreement formed pursuant thereto may unilaterally seek third party dispute resolution shall be arbitration as provided in an agreement between a Shipper and CN/WC, or, if no such provision has been made, under the Commercial Arbitration Rules administered by the American

Arbitration Association; and (b) that, in any case, arbitration shall be decided no more than 90 days from the date of selection of the arbitrator.

The GLT/CN Agreement. NITL indicates that, although it supports the CN/WC control transaction, it does not believe that compliance by CN with the terms of the GLT/CN Agreement should be imposed as a condition of the transaction. NITL explains that, as a policy matter, it believes that the Board should not acquiesce in or approve arrangements by which one competitor is given direct or indirect control over the pricing of another. Such an arrangement, NITL warns, may result in the diminishment of competition, to the detriment of the shipping public.

AK Steel Corporation. AK Steel, which has concerns respecting two matters (here referred to as the B&LE abandonment issue and the GLT/CN Agreement issue), contends that, if we approve the CN/WC control transaction: we should impose a condition that will require GLT and its B&LE subsidiary to adhere to GLT's representation that it will not take any actions to abandon service to AK Steel's manufacturing facility at Butler, PA; and we should not impose the GLT/CN Agreement as a condition of approval of the CN/WC control transaction. AK Steel further contends that, if we approve the CN/WC control transaction and do impose the GLT/CN Agreement as a condition of approval, we should not approve that agreement's "secret amendment" provisions, and we should not insulate certain pre-existing restrictions against future legal challenges. AK Steel indicates that: if the Board approves the CN/WC control transaction with the GLT/CN Agreement as an adopted condition, AK Steel opposes the CN/WC control transaction; but, otherwise, AK Steel neither supports nor opposes the CN/WC control transaction.

The B&LE Abandonment Issue. (1) AK Steel contends that its Butler facility, which ships/receives via B&LE approximately 600,000 tons per year of inbound scrap, pig iron, and coils of steel, and a comparable amount of outbound traffic, is captive to B&LE. AK Steel asserts that this traffic, due to its size, weight, and other characteristics, must be shipped by rail, and is not amenable to shipment by motor carrier or other transportation modes. AK Steel further asserts that B&LE is the only rail carrier that now has physical access to the Butler facility. AK Steel adds that, although GLT suggested (at an early stage of this proceeding) that a second rail carrier — the Buffalo & Pittsburgh Railroad Company (BPRR) — also has physical access to the Butler facility, that suggestion is simply wrong; BPRR, AK Steel contends, does not have physical access to the Butler facility.

(2) AK Steel notes that, at an early stage of this proceeding, GLT argued that approval of the CN/WC control transaction would result in the abandonment, by B&LE, of rail service to AK Steel's Butler facility. AK Steel further notes that, at that early stage of this proceeding, GLT elaborated upon this argument by explaining: that U.S. Steel currently transports, via a rail-water-rail routing, approximately 2.9 million tons of taconite ore each year from the Minntac taconite facility in Minnesota to U.S. Steel's Edgar Thomson plant in Pittsburgh, PA; that the

carriers participating in this routing are GLT's DM&IR rail subsidiary (which transports the taconite from Minntac to the Lake Superior docks), GLT's USS Fleet water subsidiary (which transports the taconite from the Lake Superior docks to Conneaut, OH), GLT's P&C Dock rail subsidiary (which reloads the taconite onto railcars at Conneaut), and GLT's B&LE rail subsidiary (which transports the taconite from Conneaut to Pittsburgh); that the CN/WC control transaction will enable CN/WC to divert this taconite traffic to an all-rail movement not involving B&LE; that, however, because this taconite traffic accounts for 80% of the revenue generated by the 90-mile south half of the B&LE system (between Greenville, PA, and North Bessemer, PA), diversion of this traffic would destroy the viability of the south half of the B&LE system; and that, therefore, B&LE's loss of this taconite traffic would force B&LE to abandon the south half of its system, which (GLT noted) is now used by B&LE to serve both U.S. Steel's Edgar Thomson facility and AK Steel's Butler facility.

(3) AK Steel further notes that, after AK Steel became aware of GLT's "threat" to abandon service to AK Steel's Butler facility: AK Steel filed a notice of intent to participate in this proceeding, and served upon GLT discovery requests respecting GLT's "threat" to abandon service to the Butler facility; when GLT refused to respond to certain portions of these discovery requests, AK Steel filed a motion to compel that asked the Board to order GLT to produce the withheld materials; GLT, in its response to the motion to compel, represented that it had concluded (upon reviewing the matter in greater depth) that B&LE would continue to serve AK Steel and other customers on the southern part of the B&LE line even if approval of the CN/WC control transaction resulted in "substantial diversions" of taconite traffic to an all-rail routing; GLT, in its response to the motion to compel, further represented that, in view of this conclusion, it no longer expected to argue that AK Steel and other shippers on the southern part of the B&LE line would be likely to lose rail service if the transaction were approved; and AK Steel, acting in reliance on these representations, withdrew its motion to compel.

(4) AK Steel contends that, if we approve the CN/WC control transaction, we should impose a condition that will require GLT and B&LE to adhere to GLT's "on-the-record" representations that, even if B&LE incurs "substantial diversions" of taconite traffic as a result of approval of the CN/WC control transaction, GLT/B&LE will not take any actions to abandon service to AK Steel's Butler facility. AK Steel, which is concerned that GLT made these representations solely to avoid discovery, and, left to its own devices, may recant them, insists that we must be vigilant in doing what we can to ensure that representations made by parties to our proceedings are actually honored. AK Steel adds that it is particularly important to hold GLT to its representations respecting service to AK Steel's Butler facility: because GLT's representations were made to avoid discovery disclosures; because continued B&LE service to AK Steel's Butler facility is critical to AK Steel; and because AK Steel, in formulating its position in this case, relied on GLT's representations.

(5) AK Steel maintains that, even though GLT is not an applicant in this proceeding, GLT should nonetheless be ordered to adhere to the on-the-record representations it made as a party to

this proceeding. AK Steel adds that the requested order could take the form of an order included in the CN/WC merger decision or a supplemental order entered pursuant to 49 U.S.C. 11327.

The GLT/CN Agreement Issue. (1) *Taconite Traffic Of Concern To AK Steel.* AK Steel indicates: that it currently ships taconite from EVTAC's Fairlane facility in the Minnesota Iron Range;⁵³ that, although AK Steel does not currently ship this taconite to ultimate destinations at Gary, IN, Indiana Harbor, IN, Pittsburgh/Braddock, PA, Nanticoke, ON, or Lorain, OH,⁵⁴ AK Steel has in the past shipped, and may in the future ship, taconite from EVTAC's Fairlane facility to ultimate destinations at such points; and that, although the ultimate destination (AK Steel's steel mill at Middletown, OH) of the taconite that AK Steel now ships from EVTAC's Fairlane facility is not subject to the DM&IR agency arrangement that is provided for in the GLT/CN Agreement, there is reason to fear that the scope of the DM&IR agency arrangement may be expanded (under the "secret amendment" provisions of the GLT/CN Agreement) to include that ultimate destination. And, AK Steel further indicates, although it does not now ship taconite from EVTAC's Fairlane facility via Escanaba, AK Steel may in the future ship such taconite via Escanaba; and AK Steel notes that such traffic would be covered by the DM&IR agency arrangement, under which (AK Steel explains) DM&IR is authorized to offer through rates for joint-line movements of taconite originating at points served by DM&IR and moving to WC's Escanaba Docks and through WC's Escanaba Docks for further waterborne transport.

(2) *AK Steel's Opposition To The GLT/CN Agreement.* AK Steel contends that the GLT/CN Agreement (and, in particular, the DM&IR agency arrangement provided for therein) will effectively eliminate two forms of competition that would otherwise exist between CN/WC and GLT (the competition that would be created by new track construction; and potential "bridge carrier" competition between CN/WC and GLT's USS Fleet water subsidiary) and will also thwart bottleneck relief for bridge/destination hauls. (a) As respects the competition that would be created by new track construction, AK Steel explains: that, because CN's lines in the Minnesota Iron Range extend near to DM&IR-served taconite facilities, CN/WC could (with build-ins, build-outs, or other track construction) provide origin competition to DM&IR; that, however, the DM&IR agency arrangement covers movements over CN/WC of taconite originating at points served by DM&IR; that, even if new track construction were to allow CN/WC to originate such traffic, such traffic would still originate at a point served by DM&IR, and, therefore, such traffic would still be covered by the DM&IR agency arrangement (which

⁵³ This facility is located at a point served by DM&IR, and, therefore, taconite traffic originating at this facility is subject to the DM&IR agency arrangement that is provided for in the GLT/CN Agreement.

⁵⁴ These are the "ultimate destinations" that are subject to the DM&IR agency arrangement that is provided for in the GLT/CN Agreement.

makes DM&IR CN/WC's exclusive agent for the arrangement of all-rail transportation of taconite originating at points served by DM&IR and moving over CN/WC's lines to the indicated ultimate destinations); and that, as a practical matter, neither CN/WC nor shippers will have any incentive to construct the new track that would allow CN/WC to originate traffic at points served by DM&IR, because, even if such new track were constructed, the traffic would remain captive to DM&IR pricing.⁵⁵ (b) As respects potential "bridge carrier" competition between CN/WC and GLT's USS Fleet water subsidiary, AK Steel explains: that, because the "ultimate destinations" of much of the taconite traffic originated at DM&IR-served points are served by CSX, CN/WC could, if it cared to, participate in potentially competitive DM&IR-CN/WC-CSX service alternatives (a DM&IR-CN/WC-CSX all-rail routing would be an alternative to a DM&IR-USS Fleet-CSX rail-water-rail routing); that, if a shipper were to receive, from DM&IR and CN/WC, separate bids for their respective portions of the all-rail routing, DM&IR (which would not know what the CN/WC bid would be) might submit a bid that would allow the all-rail routing to underbid the rail-water routing; but that the DM&IR agency arrangement will enable DM&IR to ensure that no such underbidding occurs, because DM&IR (as CN/WC's agent) will know what the CN/WC bid will be and will therefore be able to price the DM&IR-USS Fleet bid and the DM&IR-CN/WC bid to guarantee whatever result DM&IR wants. (c) As respects the thwarting of bottleneck relief for bridge/destination hauls,⁵⁶ AK Steel contends: that, pre-merger, if a DM&IR-captive shipper using a DM&IR-WC routing were to obtain a separate contract with WC, that shipper could seek bottleneck rate relief against DM&IR;⁵⁷ that, however, the GLT/CN Agreement, by making DM&IR CN/WC's exclusive agent, ensures that, post-merger, a DM&IR-captive shipper using a DM&IR-CN/WC routing will not be able to obtain a separate contract with CN/WC; that, therefore, the GLT/CN Agreement ensures that bottleneck rate relief that would have been available prior to the CN/WC control transaction will not be available subsequent to the CN/WC control transaction; and that, as a practical matter, the result will be the expansion of DM&IR's monopoly power all the way to the end of CN/WC's lines.

⁵⁵ Applicants and GLT insist that, although the DM&IR agency arrangement provided for in the GLT/CN Agreement applies to movements of taconite "originating at points served by" DM&IR, see GLT-16 at 3, the GLT/CN Agreement will have no effect on build-ins to or build-outs from taconite origins. See CN/WC-16 at 34-35 and 37; GLT-19 at 3.

⁵⁶ The "bridge" hauls referenced by AK Steel are movements in which CN/WC is a "bridge" carrier, and another carrier — e.g., CSX — serves the "ultimate destination." The "destination" hauls referenced by AK Steel are movements in which CN/WC itself serves the "ultimate destination."

⁵⁷ AK Steel claims that, in the past, WC has entered into separate contracts for DM&IR-originated taconite shipments moving to AK Steel's Middletown steel mill. See AKS-11 at 2 n.3.

(3) *Main Relief Requested By AK Steel.* AK Steel asks that the Board not impose the GLT/CN Agreement as a condition of approval of the CN/WC control transaction. AK Steel argues that the GLT/CN Agreement (and, in particular, the DM&IR agency arrangement provided for therein) is a blatantly anticompetitive attempt to prop up, and indeed to augment, DM&IR's continued monopoly pricing of taconite traffic. AK Steel further argues that, because the GLT/CN Agreement (and, in particular, the DM&IR agency arrangement provided for therein) permits DM&IR and CN/WC to engage in collective activities (e.g., joint pricing of contract movements) that are intended to prevent shippers from obtaining the benefit of marketplace competition, the GLT/CN Agreement raises serious antitrust issues; agreements that allocate customers, divide markets, and fix prices (AK Steel explains) typically are found to violate the antitrust laws. AK Steel also maintains that there is no public interest justification for Board approval of the GLT/CN Agreement. (i) AK Steel concedes that the GLT/CN Agreement will help GLT to maintain its monopoly control over taconite traffic. AK Steel contends, however, that protection of a carrier's monopoly from post-merger competition is not a valid public interest. (ii) AK Steel argues that the GLT/CN Agreement will not merely preserve the status quo. This agreement, AK Steel insists, provides yet another layer of anticompetitive restrictions on Minnesota taconite shippers. (iii) AK Steel acknowledges that the GLT/CN Agreement will provide shippers with "one-stop shopping." AK Steel insists, however, that "one-stop shopping" is not what shippers want when they are trying to obtain pricing relief via build-outs and bottleneck relief; to perfect such relief opportunities, AK Steel explains, shippers must deal separately with the involved railroads. (iv) AK Steel contends that the GLT/CN Agreement cannot be justified as a means of preserving "essential services."

(4) *Alternative Relief Requested By AK Steel.* AK Steel contends that, if the Board "approves" the GLT/CN Agreement (i.e., imposes the agreement as a condition of approval of the CN/WC control transaction), the Board should grant AK Steel's two alternative requests for relief. (i) AK Steel notes that the GLT/CN Agreement authorizes the parties to amplify or further define their commercial and other rights and obligations through separate agreement documents, which documents (the GLT/CN Agreement indicates) would be confidential, with disclosure to be made to outside persons only as required by law or directly to governmental agencies. AK Steel argues: that it is concerned that these "secret amendment" provisions might allow CN/WC and GLT to extend the DM&IR agency arrangement to cover movements to/from additional origin/destination points;⁵⁸ that, although applicants have claimed that the Board would have the power to review any confidential side agreements, applicants have not explained how the Board would know when to request such a review, as the Board would not otherwise have access to, and therefore would not have knowledge of, the timing and terms of these confidential side agreements; and that the most interested parties (taconite shippers) certainly would not be aware of the terms of any such confidential side agreements. AK Steel therefore

⁵⁸ GLT insists that neither GLT nor CN intends to use the "secret amendment" provisions to expand the scope of the DM&IR agency arrangement. See GLT-19 at 2 n.4.

contends that, if the Board approves the GLT/CN Agreement, the Board should not authorize the use of secret addendums. The affected public, AK Steel maintains, should be permitted access to all amendments to the GLT/CN Agreement. (ii) AK Steel notes that the GLT/CN Agreement provides that the DM&IR/WCL trackage rights agreement pertaining to DM&IR trackage between South Itasca, WI, and Pokegama, WI, will be amended to allow WCL to use the trackage rights granted thereunder to interchange all traffic with any other carrier at Pokegama Yard, subject to certain restrictions. AK Steel insists, however, that the referenced restrictions preclude WCL from using the involved trackage to transport taconite traffic without first obtaining the consent of DM&IR. AK Steel further insists that CN is subject to similar restrictions in separate trackage rights agreements (the reference is apparently to the DM&IR/DWP trackage rights agreement, which is also mentioned in the GLT/CN Agreement). AK Steel indicates that it is not now asking the Board to litigate the legality of these restrictions, which AK Steel regards as anticompetitive; these restrictions, AK Steel explains, pre-date the CN/WC control transaction and will not be directly impacted by that transaction. AK Steel contends, however, that, if the Board approves the GLT/CN Agreement, the Board should take no action to insulate these restrictions from subsequent legal challenge either before the Board or in a court.⁵⁹

U.S. Clay Producers Traffic Association. USCPTA, an association of producers of clay engaged in producing and shipping clay in all modes of transportation from origins in Georgia, South Carolina, and Tennessee, indicates that its members could be much affected by the CN/WC control transaction: approximately 50% of the total kaolin clay slurry shipments made by USCPTA's members, USCPTA notes, are destined to points (mostly paper manufacturers) located on the lines of the Wisconsin Central. USCPTA advises, however, that, as a result of its discussions with CN, and in view of the terms of the NITL/CN Agreement, USCPTA believes that the CN/WC control transaction should be approved. And, USCPTA adds, it adopts the arguments made by NITL respecting the mitigating effect of the NITL/CN Agreement on any anticompetitive effects of the CN/WC control transaction.

ONDEO Nalco Company. ONDEO Nalco, a chemical company that serves industries in which water, energy, and efficiency are of primary importance, has a number of concerns respecting the CN/WC control transaction in particular and rail regulation in general. (1) ONDEO Nalco contends that, by disrupting service and reducing convenient transport options, the CN/WC control transaction could seriously harm Great Lakes shipping interests involved in moving taconite, could materially impact other Great Lakes economic interests supporting taconite shipping, and could affect investments in Great Lakes shipping

⁵⁹ Applicants have acknowledged that the restrictions in the trackage rights agreements that DM&IR has entered into separately with CN and WC prohibit CN and WC from transporting, over DM&IR's line without DM&IR's consent, taconite originating in Minnesota's Mesabi Range. See CN/WC-16 at 23 n.22.

infrastructure.⁶⁰ (2) ONDEO Nalco contends that the CN/WC control transaction may further compound the already difficult situation respecting the lack of effective competition between railroads; the rail rates applicable to shipments from/to a “captive” facility, ONDEO Nalco argues, are estimated to be 15% to 60% higher than the rail rates applicable to similar shipments from/to competitively served facilities. (3) ONDEO Nalco contends that rail mergers are likely to generate service disruptions, which (ONDEO Nalco warns) can raise rates and force affected companies to switch traffic to more costly trucking to meet customer needs. (4) ONDEO Nalco contends that current rail policies make it difficult for U.S. firms to compete in global markets, by allowing railroads to prevent competitive access to terminals, to maintain monopolies through “bottleneck pricing,” and to hamper the growth of viable shortline and regional railroads through “paper barriers.”

The Procter & Gamble Company. P&G, a manufacturer of consumer products, is opposed to the CN/WC control transaction. P&G, which predicts that this transaction will have a negative impact on competition and will generate only minor benefits, cites its experience with past railroad mergers in general and with the 1999 CN/IC control transaction in particular.

(1) P&G contends that the CN/WC control transaction will have an adverse impact on rail-to-rail competition, and, indeed, will continue the slow erosion of rail-to-rail competition that (P&G claims) has been taking place over the past 20 years. P&G contends, in particular, that there will be adverse competitive impacts on Canadian-origin freight that is open to both CN and CP and that moves to destinations in the region served by WC. P&G claims that its data from similar situations in previous mergers suggests that a CP-CN lane will never be competitive with a CN-direct option for the same lane. P&G insists that, in past mergers, situations of this sort have rarely produced improved service and lower rates for the shipper.

(2) P&G, citing its experience with the CN/IC control transaction, indicates that it is not impressed by CN’s claim that all active gateways affected by the CN/WC control transaction will remain open at commercially reasonable rates. P&G concedes that, in the CN/IC context, CN has indeed kept gateways open. P&G adds, however, that, when CN is the originating carrier, CN chooses the gateway that best meets its needs. P&G explains, by way of example, that, in the CN/IC context, CN — to secure its long-haul — uses Memphis, not Buffalo, as the interchange point for Canadian-origin freight with a destination in the southeast United States. P&G further explains that, because the other carrier that is part of this interline move is not pleased with the short-haul, this other carrier insists on receiving, at the expense of the shipper, the same revenue on freight routed via Memphis that it would have received on freight routed via Buffalo. P&G predicts that, in the CN/WC context, essentially the same thing will happen with respect to

⁶⁰ ONDEO Nalco indicates that one of the business units of its Specialty Division supplies comprehensive water and fuel treatment programs and services for the worldwide marine shipping industry.

interline freight that originates in the current WC region and that has a destination in the southeast United States (i.e., the Chicago interchange will be replaced by a Memphis interchange, and the carrier that is short-hauled will insist on receiving, at the expense of the shipper, the same revenue on freight routed via Memphis that it would have received on freight routed via Chicago).

(3) P&G indicates that it is not impressed by CN's claim that the CN/WC control transaction will generate service and efficiency gains for shippers by enabling CN/WC to avoid or minimize car handling between the two railroads with single-line service. P&G, which notes that CN/WC will be able to offer single-line service only if both the origin and the destination are on CN/WC, insists that, because none of P&G's traffic is routed CN-WC or WC-CN, P&G will not benefit from these asserted efficiency gains. And, P&G adds, it suspects that, in general, the number of shipments currently routed either CN-WC or WC-CN represents only a small percentage of the total number of shipments impacted by the CN/WC control transaction.

(4) P&G indicates that it is not impressed by CN's claim that the CN/WC control transaction will generate approximately \$52 million in total quantifiable public benefits (i.e., benefits such as improved equipment utilization, reduced operating costs, and general and administrative cost reductions). P&G argues that the \$52 million calculation represents savings for CN as opposed to benefits for the public at large. P&G adds that, although similar savings were no doubt realized in the CN/IC context, P&G has not yet seen any of these savings passed on in the form of reduced rates.

United States Steel. U.S. Steel, which supports the CN/WC control transaction,⁶¹ insists that the Board, if it approves the CN/WC control transaction, should not impose any condition that would require compliance by CN with, or enforcement by the Board of, the terms of the GLT/CN Agreement. The Board, U.S. Steel argues, should not permit its processes to be used to protect this blatantly anticompetitive arrangement between CN and GLT.

(1) U.S. Steel, an integrated producer of iron and steel products that formerly owned the four transportation companies (DM&IR, USS Fleet, B&LE, and P&C Dock) that are now owned by GLT, indicates: that it mines approximately 16.4 million net tons of taconite each year at its DM&IR-served Minnesota Ore Operations Mine (known as Minntac), which is located in Minnesota on the Mesabi Iron Range;⁶² that it ships this taconite to various destinations,

⁶¹ U.S. Steel explains that the CN/WC control transaction appears to offer opportunities for rail transportation services that would meet U.S. Steel's present and future transportation needs.

⁶² Minntac is located at a point served by DM&IR, and, therefore, taconite traffic
(continued...)

including its Edgar Thomson Works (located in Braddock, PA, near Pittsburgh, PA) and its Gary Works (located in Gary, IN), and also including Republic Technologies International's Lorain Works (located at Lorain, OH);⁶³ that taconite produced at Minntac is transported to consuming locations either via a rail-water (sometimes a rail-water-rail) routing or via an all-rail routing; that, with the rail-water (or rail-water-rail) routing, taconite produced at Minntac is transported by DM&IR to a DM&IR dock on Lake Superior (usually at Two Harbors, MN, but sometimes at Duluth, MN) for transfer to lake vessel; and that, with the all-rail routing, taconite produced at Minntac is transported to destination entirely by rail.

(2) U.S. Steel contends that, as respects taconite originated at Minntac and shipped to the three destinations of interest to U.S. Steel (Edgar Thomson Works, Gary Works, and Lorain Works), there is today (and putting aside, for a moment, the DM&IR agency arrangement that is provided for in the GLT/CN Agreement, there would be in the future) actual as well as potential competition between the rail-water (sometimes rail-water-rail) routing and the all-rail routing.⁶⁴ (i) With respect to Minntac taconite shipped to Edgar Thomson Works, U.S. Steel indicates: that, at the present time, contractual commitments between U.S. Steel and GLT require that a minimum of 60% of Edgar Thomson's taconite requirements move via a DM&IR-USS Fleet-P&C Dock-B&LE routing;⁶⁵ that, however, up to 40% of Edgar Thomson's taconite requirements (about 1.3 million tons per year) can be bid competitively; that, therefore, this 40% of Edgar Thomson's taconite requirements can be shipped either via the DM&IR-USS Fleet-P&C Dock-B&LE rail-water-rail routing or via an all-rail routing (via DM&IR to South Itasca,

⁶²(...continued)

originating at Minntac is subject to the DM&IR agency arrangement that is provided for in the GLT/CN Agreement.

⁶³ These three destinations are among the several "ultimate destinations" that are subject to the DM&IR agency arrangement that is provided for in the GLT/CN Agreement.

⁶⁴ The evidence suggests, however, that although there is now competition between the rail-water-rail routing and the all-rail routing as respects taconite moving to Edgar Thomson, there is not now any meaningful competition between the rail-water routing and the all-rail routing as respects taconite moving either to Gary Works or to Lorain Works (because, as noted below, neither Gary Works nor Lorain Works is now configured to permit efficient delivery of taconite by rail).

⁶⁵ U.S. Steel indicates that Edgar Thomson is actually served by rail through a switching carrier — the Union Railroad (URR) — which connects to four trunk line railroads — B&LE, CSX, NS, and the Wheeling and Lake Erie Railroad (W&LE).

WI, then via WC to Chicago, and then via either CSX or NS to Pittsburgh);⁶⁶ that the competitiveness of the all-rail routing vis-à-vis the rail-water-rail routing is greater during the winter months than during the rest of the year;⁶⁷ and that the CN/WC control transaction will strengthen the competitiveness of the all-rail routing vis-à-vis the rail-water-rail routing in two ways (because CN/WC could carry the taconite all the way to Toledo, OH, the CN/WC control transaction would allow the all-rail routing to avoid an interchange in Chicago, and would also allow a third eastern railroad — W&LE — to compete with CSX and NS for the movement to Pittsburgh).⁶⁸ (ii) With respect to Minntac taconite shipped to Gary Works, U.S. Steel indicates: that taconite shipments to Gary Works arrive on self-unloading lake vessels that discharge directly into the Gary Works ore yard; that Gary Works (unlike Edgar Thomson Works) has sufficient storage capacity to maintain a winter storage pile sufficient to meet the plant's taconite requirements during the winter months; and that rail service to/from Gary Works is provided by the Elgin, Joliet and Eastern Railway Company (EJ&E),⁶⁹ which connects to all major trunk lines serving the Chicago area (including CN and WC).⁷⁰ (iii) With respect to Minntac taconite

⁶⁶ U.S. Steel indicates that, with either a DM&IR-WC-CSX routing or a DM&IR-WC-NS routing, the final movement into Edgar Thomson would actually be made by URR. Applicants indicate that the DM&IR-WC-CSX-URR routing is actually a DM&IR-WC-CSX-MKC-URR routing (the McKeesport Connecting Railroad is referred to as MKC). See CN/WC-16 at 23 n.24.

⁶⁷ U.S. Steel notes that, because the locks at Sault Ste. Marie between Lake Superior and Lake Huron are closed during the winter months (January 15 to March 25), the rail-water-rail routing cannot operate during that period. But U.S. Steel also notes that, although Edgar Thomson itself has only limited storage capacity, the rail-water-rail routing can be used prior to the onset of winter to build a taconite stockpile at P&C Dock's Conneaut facilities, and, therefore, the rail-water-rail routing *can* supply Edgar Thomson's taconite requirements even during the winter months. U.S. Steel further notes, however, that, because this stockpile can be built and maintained only at considerable expense, the all-rail routing is more competitive vis-à-vis the rail-water-rail routing during the winter months than during the rest of the year.

⁶⁸ U.S. Steel indicates that, with a DM&IR-CN/WC-W&LE routing, the final movement into Edgar Thomson would actually be made by URR.

⁶⁹ EJ&E is an indirect subsidiary of U.S. Steel.

⁷⁰ U.S. Steel indicates, however, that Gary Works is not now configured to permit efficient delivery of taconite by rail.

shipped to Lorain Works, U.S. Steel indicates that Lorain Works (like Gary Works) is configured to receive taconite shipments directly via lake vessel.⁷¹

(3) U.S. Steel contends that the DM&IR agency arrangement that is provided for in the GLT/CN Agreement will have anticompetitive effects. U.S. Steel explains: that WC and GLT have been competitors for U.S. Steel's taconite traffic; that, indeed, WC has been an aggressive competitor, seeking to participate in all-rail movements of taconite that directly compete with the rail-water-rail movements in which USS Fleet participates; that, therefore, an arrangement that gives GLT the exclusive right to determine whether to set a joint DM&IR-CN/WC rate and at what level will have an anticompetitive effect; that, in fact, the DM&IR agency arrangement was intended to have an anticompetitive effect (i.e., it was crafted for the very purpose of protecting USS Fleet and B&LE from post-transaction competition from CN/WC); and that the GLT/CN Agreement gives DM&IR the ability (it already has the incentive) to set the combined DM&IR-CN/WC rate factor on all-rail movements at a level that will render the all-rail routing uneconomic for U.S. Steel, and that will therefore force U.S. Steel's taconite traffic to move via the rail-water-rail routing. U.S. Steel further explains: that, at the present time, U.S. Steel is party to a contract with GLT that provides that DM&IR's division of joint-line rail rates shall increase or decrease (subject to a minimum rate) by the same percentage increase or decrease that U.S. Steel negotiates with other carriers in the route; that, therefore, U.S. Steel can today negotiate directly with trunk line railroads (which have an interest in promoting all-rail options), and those negotiations are in fact determinative of DM&IR's rate; but that, because the GLT/CN Agreement provides that CN/WC may not even solicit an all-rail movement of taconite for the account of U.S. Steel to Pittsburgh or Gary, and may not set a price to U.S. Steel for CN/WC's portion of the movement, the GLT/CN Agreement will turn CN/WC into an utterly passive participant (rather than an aggressive competitor like WC), and not only in the case of competition between rail-water (or rail-water-rail) movements and all-rail movements but also vis-à-vis alternative all-rail routes.⁷² U.S. Steel adds: that, upon expiration or termination of

⁷¹ U.S. Steel indicates that Lorain Works (like Gary Works) is not now configured to permit efficient delivery of taconite by rail.

⁷² GLT maintains that the GLT/CN Agreement will not result in the loss, by U.S. Steel, of the benefit of a provision in its contract with GLT that sets DM&IR's revenue division of joint-line rail rates by reference to the division U.S. Steel negotiates with other carriers in the route. GLT explains: that the cap on DM&IR's revenue division under the existing contract does not depend on an interline carrier quoting a price directly to U.S. Steel; that, instead, it is based on the level of interline carriers' revenue divisions on joint through rates; that, under the GLT/CN Agreement, CN/WC will independently set its own revenue requirements for U.S. Steel moves and will provide them to DM&IR; that those independently established revenue requirements will continue to be determinative of DM&IR's rate under the existing contract; and
(continued...)

U.S. Steel's current contract, U.S. Steel would have the right to negotiate separately with each carrier in an all-rail route for a contract rate for the through movement of taconite from DM&IR origins to U.S. Steel's Pittsburgh and Gary facilities; that this would allow U.S. Steel to maximize its ability to obtain a competitive all-rail rate, because DM&IR (the bottleneck carrier) would not know the rate factors of the other participating carriers and therefore would not know at what level it must set its own rate factor in order to favor a rail-water (or rail-water-rail) move; but that the DM&IR agency arrangement will preclude CN/WC from entering into a contract with U.S. Steel for just its (CN/WC's) portion of the movement.

(4) U.S. Steel concedes that the GLT/CN Agreement establishes a "commercial feasibility" standard. U.S. Steel explains that the GLT/CN Agreement provides that DM&IR's agency responsibility under the DM&IR agency arrangement will extend only to all-rail, joint-line movements that are "commercially feasible" (i.e., movements with respect to which the aggregate revenue requirements of DM&IR, CN/WC, and any other participating railroad permit a through rate and a quality of service that are competitive with comparable through rate and service offerings otherwise available, including any offerings involving maritime transportation). U.S. Steel asserts, however, that its interests would not be protected by this "commercial feasibility" standard. (i) U.S. Steel explains that, because the "commercial feasibility" standard is premised upon the aggregate revenue requirements of all of the participating rail carriers, U.S. Steel will be denied the right, upon expiration of its contract with GLT, to negotiate a separate contract with CN or to separately challenge the reasonableness of DM&IR's bottleneck rate factor under the contract exception to the Board's bottleneck rules. The "commercial feasibility" standard, U.S. Steel adds, means that DM&IR's rate factor will only be subject to review for reasonableness in the context of the entire through rate. (ii) U.S. Steel explains that, because the "commercial feasibility" standard requires the through rate to be competitive with comparable through rates available to the shipper, U.S. Steel would be precluded (upon expiration of its present contract with GLT) from any comparison of the DM&IR rate factor for all-rail movements with the DM&IR rate factor for rail-water (or rail-water-rail) movements to determine if DM&IR is discriminating in favor of rail-water (or rail-water-rail) movements, and hence in favor of the other GLT companies. And, U.S. Steel adds, the GLT/CN Agreement does not define "comparable through rate and service offerings," nor does it indicate how the parties will obtain comparable through rates for comparison purposes, particularly to the extent such rates are in confidential contracts. (iii) U.S. Steel explains that the "commercial feasibility" standard does not give any shipper the right to challenge DM&IR's determination that a

⁷²(...continued)

that, under the DM&IR agency arrangement, any shipper (including U.S. Steel) will be free to discuss rates directly with CN/WC and to encourage it to lower its revenue requirement (consistent with the requirement that the movement be profitable for CN/WC). See GLT-19 at 3.

particular all-rail, joint-line movement is commercially feasible; rather, U.S. Steel explains, the GLT/CN Agreement places that determination within the sole discretion of DM&IR.⁷³

(5) U.S. Steel contends that the Board should not impose the terms of the GLT/CN Agreement as a condition; the Board, U.S. Steel maintains, should not allow CN and GLT to shield themselves from the antitrust scrutiny that will occur if the GLT/CN Agreement is not exempted from such scrutiny by the immunizing force of 49 U.S.C. 11321(a). U.S. Steel argues: that there is no evidence (and no reason to believe) that the CN/WC control transaction will have a significant anticompetitive effect for which a remedy needs to be devised; that, indeed, there is no reason to believe that the CN/WC control transaction will have any anticompetitive effect at all; that, rather, the record suggests that the CN/WC control transaction, by making the all-rail routing more efficient, may have the effect of increasing competition between the rail-water (or rail-water-rail) routing and the all-rail routing; and that, although such increased competition (if it occurs) may result in traffic diversions, the Board has always held that traffic diversions that occur through natural rivalry between competitors leading to lower rates or improved service are not anticompetitive. U.S. Steel also argues that, under 49 U.S.C. 11324(d), the Board cannot approve the CN/WC control transaction with the GLT/CN Agreement as a condition (because, U.S. Steel explains, the anticompetitive effects of that agreement — i.e., a substantial lessening of competition and a restraint of trade in freight surface transportation — will outweigh any public interests that might otherwise be served by the CN/WC control transaction). U.S. Steel further argues that the DM&IR agency arrangement is, in essence, the kind of “traffic protective condition” that the Board has long regarded as anticompetitive (because, as a practical matter, it would require the post-transaction CN/WC to provide “rate equalization” to protect against the diversion of traffic now moving via a rail-water or rail-water-rail routing). And, U.S. Steel adds, the DM&IR agency arrangement amounts to the kind of agreement among competitors not to compete on price or output that is generally regarded as a per se violation of the antitrust laws.

Vulcan Chemicals. Vulcan, a business unit of Vulcan Materials Company, asks that two conditions (a Port Edwards switching condition and an open gateways condition) be imposed on approval of the CN/WC control transaction.

The Port Edwards Plant. Vulcan’s plant at Port Edwards, WI, which ships a substantial amount of freight by rail (more than 1,500 cars in the year 2000), now has, and for some time has

⁷³ U.S. Steel adds that, although the GLT/CN Agreement also provides that DM&IR, in establishing its revenue requirements for its portions of movements covered by the DM&IR agency arrangement, shall not act unreasonably or anticompetitively, this provision too is insufficient to address U.S. Steel’s objections: because this provision is subject to the through rate standard of commercial feasibility; and because this provision does not give a shipper any private right of action to challenge the reasonableness or anticompetitiveness of DM&IR’s bottleneck rate factor.

had, access to two railroads: WC and UP.⁷⁴ Vulcan indicates, however: that, “[u]ntil very recently,” the Port Edwards plant was not directly accessed either by WC or by UP; that, rather, “[u]ntil very recently,” traffic moving from/to the Port Edwards plant was switched by Georgia Pacific Corporation (GPC) over tracks located almost exclusively on the GPC facility adjoining the Port Edwards plant; and that this GPC switching service permitted the Port Edwards plant to have access both to WC and to UP. Vulcan further indicates: that, when GPC decided that it no longer wanted to provide switching services for the Port Edwards plant, Vulcan began negotiating with WC for direct access by WC to the Port Edwards plant (which, Vulcan and WC knew, would require construction of a crossover); that a primary consideration for Vulcan was that the switching charge imposed by WC be at a level that would permit UP to continue to provide commercially viable and competitive service to the Port Edwards plant; that, in due course, Vulcan and WC entered into an agreement (the Vulcan/WC agreement) that provides for a reciprocal switching fee of \$300 per car (Vulcan cites, with respect to this \$300 switching fee, Supplement 8 to Freight Tariff WC 8222-B); and that the Vulcan/WC agreement also provides that, for a period of 5 years, Vulcan must receive and tender certain minimum volumes of traffic via WC to compensate WC for its expenditures in connection with construction of the tracks (i.e., the crossover) necessary to provide service to the Port Edwards plant. Vulcan claims that the \$300 switching fee accomplishes the dual goals of: (a) fairly and adequately compensating WC for its services; and (b) keeping the competitive services of UP available to the Port Edwards plant.

Vulcan’s Rail Freight. Vulcan contends that the Port Edwards plant now has access to two railroads (WC and UP), which (Vulcan claims) compete for Port Edwards traffic both as respects single-line traffic (i.e., traffic destined to locations served both by WC and by UP) and as respects traffic moving to destinations on other carriers (i.e., traffic that WC and UP can interchange with another carrier at an interchange location such as Chicago). Vulcan further contends that, although some of its freight is shipped to destinations located on WC and some of its freight is shipped to destinations located on UP, “the large majority” of its freight is shipped via gateways (the most prominent of which is Chicago) to destinations located at points on other railroads (and, Vulcan adds, “[i]n many instances,” the connecting railroad is CN/IC). Vulcan asserts that it is vitally important: that the WC vs. UP competition that now exists be preserved; and that the gateways via which Vulcan’s traffic now moves be kept open and competitive.

Port Edwards Switching Condition. Vulcan contends: that, with respect to the WC vs. UP competition that exists today (i.e., with respect to movements from/to the Port Edwards plant for which there is, today, WC vs. UP competition), the Port Edwards plant must be regarded as a 2-to-1 point if Vulcan will be deprived of post-transaction access to UP; that, as a practical matter, Vulcan will be deprived of post-transaction access to UP, if the switching fee charged by CN/WC is increased above the \$300 level recently negotiated by Vulcan and WC (as

⁷⁴ Union Pacific Railroad Company is referred to as UP.

fairly escalated to reflect increased costs); and that, to the extent that CN/WC is free to increase the switching fee above the agreed-upon level, it is free to foreclose effective competition from UP at the Port Edwards plant. Vulcan therefore asks that the Board impose upon approval of the CN/WC control transaction a condition that will require CN/WC to maintain the current \$300 per car switching fee at the Port Edwards plant (CN/WC, Vulcan maintains, should be required to honor the provisions of the existing WC switching tariff applicable to the Port Edwards plant), subject only to escalation for demonstrated increases in the cost of providing that service.⁷⁵

An Open Gateways Condition. Vulcan notes that applicants have pledged to keep all active gateways affected by the CN/WC control transaction open “on commercially reasonable terms.” Vulcan asserts, however, that, although this pledge may be appropriate to various of the smaller gateways, the prominence of the Chicago gateway requires a more specific condition. Vulcan asserts, in particular, that, because the large majority of its freight moves to connecting carriers via gateways (the most prominent of which is Chicago), the Board should impose a condition that will require CN/WC to keep “all existing active gateways, most particularly Chicago,” “open and competitive” so as to permit the use of these gateways by Vulcan without interference or competitive injury. The failure to impose such a condition, Vulcan warns, could leave the opportunity for mischief in the future, particularly if there should be other mergers involving applicants.

Wisconsin Manufacturers & Commerce. WMC, an association of some 6,000 businesses that maintain manufacturing and commercial establishments in Wisconsin, indicates that it is “unequivocal” in its support for approval, and quick consummation, of the CN/WC control transaction; a long delay in the resolution of WC’s future, WMC warns, will result in an acceleration of the deterioration of the level of rail service quality that it took WC most of a decade to build; and, WMC adds, the CN/WC control transaction is the only alternative available in time to arrest the erosion of past WC gains. WMC further indicates, however, that, although its support for the transaction is “unequivocal” and not “subject to” the imposition of any conditions, it nevertheless believes that there are compelling reasons to impose a number of conditions on approval of the transaction.

⁷⁵ Applicants contend, see CN/WC-16 at 74-75, and Vulcan concedes, see VUL-3 at 2, that the existing contractual arrangement between Vulcan and WC respecting UP switching at the Port Edwards plant: has a 5-year term (which ends in December 2005); establishes the switching charge at \$300 per car; and provides that any escalation may occur only in “proportion to the escalation of reciprocal switch charges published by the UP for provision of services to WC.” Vulcan maintains, however (see VUL-3 at 2), that the Port Edwards switching condition it is asking the Board to impose would not contravene or supersede the existing contractual arrangement between Vulcan and WC, but, rather, would become effective only after the expiration of the existing contractual arrangement (i.e., would become effective in December 2005).

Competition Issues Not Addressed By Applicants. WMC contends that the CN/WC applicants have not addressed a number of the issues discussed in the Board's new "major merger" rules.⁷⁶ (1) *Downstream Mergers.* WMC, which claims that recent trade press reports have indicated that either a BNSF/CN merger proposal or a CP/CN merger proposal may be in the works, warns that, if the CN/WC control transaction is consummated, any future combination involving two or more of BNSF, CN, and CP would have a dramatic impact on rail competition in Wisconsin. (2) *Transnational Ownership.* WMC contends that, if the CN/WC control transaction is approved and consummated, the lion's share of rail properties for Wisconsin shippers and all rail properties serving central and northern Wisconsin and the Upper Peninsula of Michigan will be under foreign control. (3) *Legacy Or Spinoff Conditions Restricting Competition.* WMC contends that, although one important "spinoff" (or "legacy") restriction on WC's operations (the restriction that precluded WC overhead traffic between Superior and Chicago) was eliminated several years ago, there has been no systematic review of such anticompetitive restrictions for consistency with current public policy. Such restrictions, WMC argues, are detrimental to competitiveness, and, in view of the Board's new policy favoring enhancement of competition, should not be allowed to stand indefinitely. (4) *Enhancement Of Competition.* WMC, which asserts that the Board should apply in this proceeding the competition enhancement policies articulated in the new "major merger" rules,⁷⁷ claims that the CN/WC applicants have not addressed enhancement of competition. Essentially all of the benefits claimed in support of the transaction, WMC explains, are traditional benefits of consolidation, which (WMC adds) can enhance the competitiveness of rail in relation to other modes but either do nothing with respect to, or actually weaken, rail-to-rail competitiveness.

Flaws And Shortcomings Of The NITL/CN Agreement. WMC indicates that, although it believes that the NITL/CN Agreement represents the type of private sector negotiated problem solving that often effectively advances important public policy objectives, it also believes that the NITL/CN Agreement has substantial flaws and shortcomings.

(1) *Service Protection.* WMC contends that the service protection provisions of the NITL/CN Agreement have at least the following serious flaws: service protection is afforded only to those shippers that enter into a contract; no relief or service standard commitment is made to smaller shippers or single-car freight; no commitment is made beyond making a "good faith offer" to enter into an agreement; and overall service levels, including not only transit time but also car supply and other pertinent measures of service quality, are not addressed. WMC further

⁷⁶ See Major Rail Consolidation Procedures, STB Ex Parte No. 582 (Sub-No. 1) (STB served June 11, 2001, and published in the Federal Register on June 15, 2001, at 66 FR 32582).

⁷⁷ Rail users located on WC's lines, WMC explains, should be afforded the same application of the National Transportation Policy — in the form of the competition enhancement policies articulated in the new rules — as rail users located on Class I railroads.

contends that, although the service protection provided by the NITL/CN Agreement relates solely to transit time, a major concern of WMC's members is maintenance of boxcar supply; WMC's members are particularly concerned, WMC adds, that the fleet of quality boxcars in which WC invested for the Wisconsin paper industry, and which has been supported by rates paid by Wisconsin shippers, not be diluted throughout the CN network without adequate assurances that a comparable concentration and availability of quality boxcars will be maintained for Wisconsin shippers currently served by WC's boxcar fleet (including those shippers whose freight does not move under contract). WMC argues that, although it applauds the effort to focus on private and market-based mechanisms for protection of service, the service protection conditions should include a commitment by CN to mechanisms by which shippers or groups of shippers may trigger CN's attention to service protection on a broader basis (i.e., broader than transit time alone) prior to resort to seeking formal relief from the Board.

(2) *Interchange Protection.* WMC contends that the gateway protection provisions of the NITL/CN Agreement are flawed in at least these respects: the commitment to maintenance of a given gateway is limited to the shipper or shippers that actually used the gateway within 12 months prior to the NITL/CN Agreement, and appears to be limited to specific origins and/or destinations of traffic that cleared the interchange. WMC contends that the gateways to be protected: should be open to any shipper; should not be restricted to specific origins and/or destinations or commodities; should include all open gateways regardless of activity within any specified time period (WMC explains, by way of example, that existence of an open gateway may have provided the competitive pressure for consummation of a multi-year contract via an alternative gateway); and should not be subject to a "then in active use" condition at the close of the 5-year period following consummation of the CN/WC control transaction. And, WMC adds, gateway protection should neither be limited to traffic moving under contract nor require entry into a contract to be maintained.

(3) *Dispute Resolution.* WMC contends that, whereas the NITL/CN Agreement's dispute resolution provisions require a contract with a shipper seeking redress, CN should be invited to offer an alternative dispute resolution procedure that would be available to any person or entity (i.e., not just shippers but also other persons, such as governmental bodies, interest groups, and rail and other carriers). WMC further contends that assurance of availability of a reasonable and effective alternative dispute resolution procedure requires informal and formal access to dispute resolution before the Board for minor as well as major matters.

Conditions Requested By WMC. (1) WMC requests that the Board retain jurisdiction for a minimum of 5 years and provide a clear path beyond private dispute resolution procedures to both informal and formal dispute resolution before the Board. (2) WMC also requests that the Board refine and expand the conditions set forth in the NITL/CN Agreement by removing their serious flaws and ambiguities and by incorporating the refined and expanded version suggested by WMC, which includes (by way of example and not by way of limitation): (a) providing access to the protective conditions for common as well as contract rail users; (b) expanding the

service protection provisions to include the availability and quality of boxcars comparable to the supply and quality concentration achieved by WC; (c) extending the service protection provisions to overall service levels (to include not only transit time but also car supply and other pertinent measures of service quality); (d) requiring maintenance of all gateways maintained by WC for any freight, origin, or destination for all classifications of freight and service, and for all origins and destinations; and (e) requiring CN to use its good offices and all commercially reasonable resources to maintain the cooperative pricing and marketing arrangements by which WC extended its reach beyond WC's properties and by which other railroads extended their reach to users on WC's properties. (3) WMC further requests that the Board impose a condition that will require CN, and that will challenge shippers, other railroads, governmental entities, and other interested persons, to engage during the 5-year monitoring period in good faith negotiations to enhance rail-to-rail competition through: (a) bilateral negotiations to open what will be CN-only and what are CP-only shipper locations in Wisconsin; and (b) multilateral negotiations of railroads, shippers, and others working toward a balancing of interests or trade-offs including, but not limited to, expanding access opportunity, commitment of new freight not otherwise then moving via rail, other relevant economic and service factors, and public and/or private funding contributions to assist needed infrastructure improvements.

Wisconsin Public Service Corporation. WPS, an electric and gas utility that serves customers in northeastern Wisconsin and Upper Michigan, indicates: that, as pertinent, it operates two coal-fired electric generating stations (the Pulliam Station in Green Bay, WI, and the Weston Station near Wausau, WI) that together consume approximately 2.8 to 3.0 million tons of Powder River Basin (PRB) coal each year; that all of this coal is transported by rail; that all of the coal moving to the Pulliam Station is delivered by WC from interchanges with the two PRB origin carriers at Chicago, IL, and Minneapolis-St. Paul, MN; that, however, deliveries to the Weston Station are split between WC and CP (CP, WPS notes, also maintains interchange capabilities at Minneapolis-St. Paul); that CP, in order to reach the Weston Station, must operate over approximately 91 miles of WC trackage from New Lisbon, WI, north to the Weston Station; and that CP operates over this WC trackage pursuant to a trackage rights agreement (the 1987 WC/CP trackage rights agreement) that was entered into with WC in 1987 by CP's predecessor, as part of the series of line acquisitions that led to the establishment of WC's original rail system. WPS further indicates that WC transports coal for WPS pursuant to a series of six long-term rail service contracts that were entered into under 49 U.S.C. 10709 and its predecessor. WPS advises that, on June 22, 2001, it received from CN specific, written assurances that, if the CN/WC control transaction is approved and consummated: WC will continue to be bound by, and to fulfill all of its obligations under, each of its coal transportation contracts with WPS; WC will continue to be bound by, and to fulfill all of its obligations under, the 1987 WC/CP trackage rights agreement respecting the New Lisbon-Weston Station line; and neither CN nor WC will attempt to invoke 49 U.S.C. 11321 to override or alter any of the terms of any of these agreements. WPS further advises that, in light of CN's written assurances, and specifically in reliance thereon, WPS does not oppose approval of the CN/WC control transaction.

Shippers Supporting CP On Gateway Preservation. Several shippers that ship freight to points served by WC — Celgar,⁷⁸ Tembec,⁷⁹ MC Forest,⁸⁰ and IMC Global⁸¹ — have asked the Board to impose the condition proposed by CP that would require CN/WC to quote commercially reasonable joint rates for transportation to/from points served by WC at the request of connecting railroads as well as shippers.⁸² These shippers have generally argued: that the CN/WC control transaction, if not properly conditioned, will harm the future competitiveness of traffic now routed CP-WC to points served by WC; that the “interchange protection” offered by CN/WC under the NITL/CN Agreement is not likely to be effective in preserving the current level of competition for traffic moving via interline routes to WC’s territory; that, however, the condition proposed by CP would preserve effective competition for traffic moving to WC-served points in Wisconsin, by enabling CP to obtain reasonable rate quotes from WC for traffic interchanged between CP and WC; and that, therefore, in order to assure that effective competition continues in the future, the Board should require CN/WC to extend the “interchange protection” provisions of the NITL/CN Agreement to connecting carriers.

⁷⁸ Celgar’s woodpulp production facility at Castlegar, BC, is served only by CP.

⁷⁹ Tembec’s woodpulp production facility at Skookumchuck, BC, is served only by CP.

⁸⁰ MC Forest’s hardwood/softwood pulp production facility near Athabasca, AB, is apparently served only by CP.

⁸¹ IMC Global’s potash production facilities at Esterhazy, Belle Plaine, and Colonsay, SK, are served by CP and CN.

⁸² Celgar, Tembec, MC Forest, and IMC Global filed separately.

APPENDIX C: CARRIER PARTIES

Canadian Pacific. CP indicates that, although it takes no position as to whether the CN/WC control transaction should be approved, it believes that any approval thereof should be subject to two conditions (a WC gateway preservation condition and a Green Bay haulage agreement extension condition) designed to prevent a diminution in rail-to-rail and source competition for freight traffic moving to/from points in WC's service territory.

WC Gateway Preservation Condition. (1) *Background.* CP contends: that CP and CN today compete actively for the transportation of a variety of commodities (most notably forest products, chemicals, and fertilizer) moving between points in Canada and points served by WC; that this CP vs. CN competition has two forms (direct competition and source competition); that, with direct competition (which generally involves traffic moving from Canadian origins commonly served both by CP and by CN), CP and CN compete directly for the customer's shipments to a WC-served receiver via their respective interline routes with WC;⁸³ and that, with source competition (which generally involves traffic moving from Canadian origins not commonly served by CP and CN), shippers located at Canadian origins served exclusively by CP compete with shippers located at Canadian origins served exclusively by CN for sales to customers served (often exclusively) by WC. CP further contends: that the volume of traffic moving between the CP and WC service territories is substantial; that, in the year 2000 alone, CP and WC interchanged more than 42,000 carloads or equivalent units; that CP and WC interchanged the majority of these shipments at the Twin Cities or Chicago; that CP and WC also interchange thousands of cars annually at Franz, ON (the sole point of connection between CP and WC's ACRI affiliate), Milwaukee, WI, and Sault Ste. Marie, MI; and that CP and WC also interchange smaller numbers of cars at La Crosse, WI, Superior, WI, and New Lisbon, WI. CP warns that, if a combined CN/WC were to close the gateways that make the existing CP-WC interline routes competitive, the CP vs. CN competition that exists today for traffic moving to/from WC points (both direct competition and source competition) would be severely impaired, if not altogether eliminated. And, CP adds, a combined CN/WC would have, as a practical matter, little incentive to cooperate post-transaction with CP (or with shippers) in maintaining competitively attractive through rates via CP-WC routings.

(2) *The New "Major Merger" Rules.* CP argues that the Board's new "major merger" rules provide that, because even an essentially end-to-end merger can generate anticompetitive effects (including the elimination of product and source competition) if the merging carriers take steps to thwart the effectiveness of competing interline routes, consolidation transactions will

⁸³ CP notes that the CP/WC and CN/WC interline routes may involve different gateways. CP indicates, by way of example, that, for certain traffic originating at commonly served points in Saskatchewan, the CP/WC routing uses a Twin Cities gateway whereas the CN/WC routing uses a Superior gateway.

henceforth be conditioned to ensure that major existing gateways are kept open. See Major Rail Consolidation Procedures, slip op. at 23-26. CP further argues, in essence, that, even though the CN/WC control transaction is not a “major merger,” the logic of the new “major merger” rules requires that the CN/WC control transaction be conditioned to ensure that major existing CP/WC gateways are kept open.

(3) *Applicants’ Pledge*. CP insists that applicants’ pledge to “keep all existing active gateways affected by the Transaction open on commercially reasonable terms,” CN/WC-2, Vol. 1 at 14 and 150, does not resolve CP’s concerns about the potential loss of rail and source competition resulting from post-merger gateway closures. CP explains that this “highly-caveated” pledge applies only to “active” gateways that are “affected by the Transaction.” CP further explains that the pledge: does not identify the specific gateways to which the pledge applies; does not describe the criteria that CN/WC would use to determine which gateways were “active,” or whether a particular gateway was “affected by the Transaction”; and does not make clear whether applicants view interchange points such as the Twin Cities and Franz (which are served today by WC but not by CN) as locations “affected by the Transaction.”

(4) *The NITL/CN Agreement*. CP insists that, although the NITL/CN Agreement’s interchange protection provisions appear to indicate that any interchange point over which traffic moved during the 12-month period preceding April 27, 2001, will be deemed an “active” gateway, the NITL/CN Agreement’s interchange protection provisions are, in other respects, inadequate to assure the preservation of effective rail and source competition for traffic moving between points in Canada and points in WC’s service territory. (a) CP argues that, although the NITL/CN Agreement’s interchange protection provisions apply to every shipper or receiver of property “on CN and/or WC,” it is not clear whether this refers to all shippers who desire to transport freight on lines operated by CN and/or WC, or only to those shippers whose facilities are physically located on CN and/or WC. CP explains that, if the latter interpretation is intended, the NITL/CN Agreement affords no protection at all to the many shippers whose facilities are located on the lines of other carriers (including CP) but who currently ship products to customers served by WC. And, CP adds, the exclusion of such shippers from the scope of the NITL/CN Agreement would result in the loss of the source competition provided by those shippers. (b) CP argues that the NITL/CN Agreement’s “shipper request” restriction (i.e., the “restriction” that provides that CN/WC will establish and maintain in effect commercially reasonable contract through rates and charges “at the request of a Shipper”) renders the NITL/CN Agreement ineffective as a means of preserving the existing level of rail and source competition for shipments to/from WC’s service territory. CP explains: that the requirement that shippers negotiate directly with CN/WC for a “commercially reasonable” rate for WC’s portion of an interline movement with CP or another connecting carrier is likely to diminish the effectiveness of the competition offered by such alternative routings; that, in most cases, the originating carrier performs this function today, obtaining the revenue requirements of connecting carriers and developing a “through rate” for the movement on behalf of the shipper; that this practice allows

shippers to deal with a single railroad in establishing the price for most interline movements; that, by contrast, under the NITL/CN Agreement a carrier such as CP could not itself develop a “through rate” to present to a shipper for a movement to/from a WC-served point; that, rather, a shipper considering a CP-WC interline route would bear the burden of negotiating separately with CP and with CN/WC to determine the rates for their respective portions of the movement; that, at the same time, CN/WC would enjoy the ability to quote single-line rates for such shipments; that the additional administrative burden and delay in obtaining a through rate for a CP-WC routing would, in all likelihood, cause shippers to prefer to do business with CN/WC rather than with CP (or with other connecting carriers); and that the resulting competitive handicap imposed on potential CP-WC routings would weaken existing competition between CN and CP for shipments to/from WC points, and would also impair the ability of producers located on CP’s lines to offer effective source competition to producers located on CN’s lines for the business of receivers located in WC territory. CP further explains: that shippers (particularly smaller shippers) are less likely than a connecting carrier (such as CP) to possess the information and resources necessary to negotiate “commercially reasonable rates” with CN/WC and/or to utilize effectively the NITL/CN Agreement’s arbitration remedy; that, by way of example, information regarding such cost elements as car hire, fuel, and labor are likely to be more readily available to the connecting carrier than to a shipper, so that the carrier would be in a better position to assess the “reasonableness” of a rate quoted by CN/WC for WC’s portion of an interline movement; that, were CN/WC to act unreasonably, the connecting railroad would have greater resources and expertise with which to pursue arbitration to establish a reasonable rate; and that the expense of arbitrating an “unreasonable” rate quotation by CN/WC might be more readily justified by a connecting carrier such as CP than by a shipper, because (from the perspective of the connecting carrier) a favorable ruling might establish a precedent for a multitude of movements via a particular gateway. And, CP adds, the arrangement provided for in the NITL/CN Agreement could itself produce anticompetitive effects, by giving CN/WC the ability to “monitor” the efforts of CP (or other carriers that interline traffic with WC today) to solicit shipments to/from points located on WC’s lines (CP notes that, whereas a rate request initiated by a connecting carrier would not necessarily reveal the shipper’s identity to CN/WC, a request by a shipper for a rate quote under the NITL/CN Agreement would immediately reveal to CN/WC the identity of the shipper and would thereby confer a potentially anticompetitive advantage upon CN/WC by allowing CN/WC to delay or withhold a rate quote for the CP-WC routing in order to give CN/WC’s marketing personnel time either to secure the business for a CN/WC routing or to supplant a proposed movement from a CP-served origin with one from a CN-served origin).

(5) *CP’s Primary Request.* CP contends that, to preserve existing WC gateways (i.e., to maintain the rail-to-rail and source competition that currently exists for traffic moving to/from WC territory), the Board should require applicants to extend to connecting railroads the NITL/CN Agreement’s interchange protection provisions. CP contends, in particular, that the Board should require applicants to quote “commercially reasonable contract through rates and charges” for the transportation of property originating or terminating at points on WC via

existing active WC interchange point(s), at the request of a carrier (such as CP) that currently interchanges traffic with WC via such interchange point(s). CP argues that extension of the NITL/CN Agreement's interchange protection provisions to CP and other connecting carriers: would enable connecting carriers (such as CP) to provide effective competition to the combined CN/WC system for traffic to/from points served by WC; would alleviate the administrative burden that shippers would otherwise face in obtaining rate quotations for shipments to/from WC territory via the lines of carriers other than CN; would enable carriers such as CP to utilize their resources and expertise on behalf of shippers to secure "reasonable" rate quotations from CN/WC, and, if necessary, to invoke arbitration to establish such rates and charges; and would more effectively ensure that the benefits of rail competition at CN-CP competitive points will continue for traffic to/from WC's service territory, and that CP-served shippers will continue to be able to provide effective source competition for shipments of commodities to receivers served by WC. And, CP adds, it would also appear to be administratively simpler for CN/WC to deal with a handful of connecting carriers (as CN and WC do in most cases today) in establishing interline rates, rather than negotiating separately with a multitude of shippers and receivers.

(6) *CP's Alternative Requests.* CP further contends, apparently in the alternative (although this is not entirely clear): that the Board should require applicants to confirm that the NITL/CN Agreement's interchange protection provisions extend to all shippers or receivers that desire to transport freight originating or terminating at a point on WC's lines, without regard to whether the shipper/receiver's facilities are located on the lines of CN, WC, or a third carrier; and that the Board should require applicants to amend the NITL/CN Agreement's interchange protection provisions to provide for a prompt response by CN/WC to a request for a rate quotation.

Green Bay Haulage Agreement Extension Condition. CP indicates that, although Green Bay is exclusively served by WC and a connecting shortline,⁸⁴ CP currently possesses the ability to provide direct rail-to-rail competition to WC for certain traffic moving to/from Green Bay. CP explains that, pursuant to a CP-WC haulage agreement dated August 28, 1993, WC agreed to provide haulage services to CP for intermodal traffic moving between Green Bay, on the one hand, and, on the other hand, various points in the northeastern United States served by CP's D&H affiliate. CP adds: that the CP-WC haulage agreement, by its terms, may be terminated by either party on 90 days' notice; that, although an independent WC has no apparent business incentive to terminate this arrangement, the post-transaction motivations of CN (CP's principal competitor) are likely to be quite different from the pre-transaction motivations of WC; and that, therefore, it is highly unlikely that the CP-WC haulage agreement will survive consummation of the CN/WC control transaction. CP contends that, to prevent CN/WC from

⁸⁴ CP notes that, although the connecting shortline — the Escanaba & Lake Superior Railroad Company (E&LS) — also serves Green Bay, E&LS cannot provide viable competition to WC because E&LS' lines connect only with WC's lines.

eliminating the only direct rail-to-rail competitive option to the merged CN/WC system that currently exists at Green Bay by canceling the existing CP-WC haulage agreement, the Board should impose a condition that would preclude cancellation (by CN/WC) of the CP-WC haulage agreement by requiring CN/WC to extend that agreement for a term of 20 years.

Great Lakes Transportation. GLT, which has concerns respecting two matters (here referred to as the GLT/CN Agreement issue and the B&LE abandonment issue), contends: that the Board should approve the CN/WC control transaction subject to the condition that applicants comply with the terms of the settlement agreement (the GLT/CN Agreement) entered into by GLT and DM&IR, on the one hand, and, on the other hand, CNR;⁸⁵ and that the Board should not impose a condition requiring B&LE to maintain service to the AK Steel facility at Butler, PA.

The GLT/CN Agreement Issue. GLT indicates that its carrier subsidiaries (DM&IR, USS Fleet, B&LE, and P&C Dock) transport taconite pellets and related materials from the Minnesota Iron Range (i.e., the iron-ore producing region of northeastern Minnesota) to steel plants throughout the Midwest. GLT further indicates that DM&IR transports taconite from three mines⁸⁶ either: (a) to DM&IR docks on Lake Superior (at Duluth, MN, and Two Harbors, MN) for loading onto USS Fleet ships (or onto bulk vessels of other lake carriers); or (b) to Duluth/Superior for interchange with other railroads (including WC, CP, BNSF, and UP) for movement to points throughout North America. GLT adds: that the bulk of the taconite produced on the Minnesota Iron Range and the Upper Peninsula of Michigan originates by rail and then moves by ship to ports in Indiana, Ohio, and elsewhere for delivery, directly or by rail, to steel mills;⁸⁷ and that only a “modest” portion of the taconite produced on the Minnesota Iron Range and the Upper Peninsula of Michigan now moves to steel mills exclusively by rail.⁸⁸ GLT

⁸⁵ See GLT-16, filed July 18, 2001 (a copy of the GLT/CN Agreement).

⁸⁶ The three Minnesota mines are U.S. Steel Minntac Plant (known as Minntac), ISPAT Inland Mining (known as Minorca), and EVTAC Mining (known as Evtac). See GLT-14, Attachment A (a map).

⁸⁷ GLT notes that WC transports taconite produced on the Upper Peninsula of Michigan to the port of Escanaba, MI, for carriage by ship to steel plants located at the southern end of Lake Michigan. GLT adds that the Lake Michigan port of Escanaba (which DM&IR cannot now access) is open for shipping at certain times of the year when the Lake Superior ports of Duluth and Two Harbors (which DM&IR can now access) are closed.

⁸⁸ GLT claims that this “modest” all-rail portion of taconite traffic consists largely of: (a) shipments that can move only by rail to mills in Alabama and Utah; (b) spot movements; and (c) seasonal movements to other destinations when some or all of the Great Lakes are closed to
(continued...)

claims that taconite, which accounts for a majority of the tonnage of the large-ship U.S.-flag carriers on the Great Lakes, is the economic backbone of the Great Lakes shipping industry; and, GLT adds, large volumes of “backhaul” commodities (including coal, limestone, and other commodities) are transported by Great Lakes carriers on return voyages.

The CN/WC Control Transaction. GLT is concerned that CN/WC common control, if not properly conditioned, could result in substantial shifts of taconite shipments from the Great Lakes to all-rail routings, particularly if CN/WC were to pursue such diversions without regard to the underlying economics of all-rail movement relative to rail-water movement. GLT warns that substantial diversions of this nature could undermine the viability of Great Lakes transportation and could lead to higher rates and the loss of a significant competitive alternative for shippers of many commodities. GLT is particularly concerned that diversions (to all-rail routings) of baseload taconite shipments could lead to higher freight rates for backhaul shipments of limestone and other commodities that currently move on the Great Lakes. GLT apparently believes that, although capacity constraints on WC’s system and/or inefficient track configurations at certain Lake-side mills in Indiana and Ohio have limited WC’s ability to attract taconite traffic, the CN/WC control transaction, by allowing WC to access CN’s financial resources, could enable WC to eliminate those capacity constraints and/or to improve the track configurations at the Lake-side mills.

The GLT/CN Agreement. The key provisions of the GLT/CN Agreement concern interline cooperation, operational issues, and other matters.

(1) As respects interline cooperation, the GLT/CN Agreement provides: that, upon consummation of the CN/WC control transaction, CN/WC will designate DM&IR as CN/WC’s exclusive agent for the arrangement of all-rail transportation for movements over CN/WC of taconite and other forms of beneficiated iron ore originating at points served by DM&IR and moving over CN/WC’s lines to ultimate destinations at Gary, IN, Indiana Harbor, IN, Pittsburgh/Braddock, PA, Nanticoke, ON, or Lorain, OH; that DM&IR’s agency responsibility under the DM&IR agency arrangement will extend only to all-rail, joint-line movements that are commercially feasible, as reasonably determined by DM&IR (i.e., movements with respect to which the aggregate revenue requirements of DM&IR, CN/WC, and any other participating railroad permit a through rate and a quality of service that are competitive with comparable through rate and service offerings otherwise available, including any offerings involving maritime transportation); that, so long as the DM&IR agency arrangement remains in effect, CN/WC will not, independently of DM&IR, solicit all-rail movements of taconite and other forms of beneficiated iron ore originating at points served by DM&IR and moving over

⁸⁸(...continued)

shipping. GLT adds that, in the past few years, a limited volume of non-seasonal taconite traffic bound for the Midwest has shifted from the Great Lakes to an all-rail movement.

CN/WC's lines to ultimate destinations at Gary, Indiana Harbor, Pittsburgh/Braddock, Nanticoke, or Lorain, or set prices to shippers for its portion of such movements, unless it is legally required to do so; that CN will notify DM&IR of the revenue requirement applicable to CN/WC's portion of each movement covered by the DM&IR agency arrangement, and DM&IR's pricing authority will be exercised only in accordance with such notice; that CN/WC's revenue requirement will be established independently by CN/WC at a level that causes the movements to which the revenue requirement applies to be profitable for CN/WC;⁸⁹ that, as part of the DM&IR agency arrangement, DM&IR shall be authorized to offer through rates for joint-line movements of taconite and other forms of beneficiated iron ore originating at points served by DM&IR and moving to WC's Escanaba Docks and through WC's Escanaba Docks for further waterborne transport; that CN will provide DM&IR with the revenue requirement applicable to CN/WC's portion of any such movement; and that, in establishing from time to time their respective revenue requirements for their respective portions of movements covered by the DM&IR agency arrangement, neither DM&IR and its affiliates nor CNR and its affiliates shall act unreasonably or anticompetitively. The GLT/CN Agreement further provides that the DM&IR agency arrangement will continue for 10 years, but will terminate at an earlier date upon either: (i) the acquisition of a majority interest in DM&IR's or GLT's voting capital stock by a customer of CN or by a Class I railroad; or (ii) the acquisition of "control" (as that word is used in 49 U.S.C. 11323) of DM&IR by a customer of CN or by a Class I railroad.

(2) As respects operational issues, the GLT/CN Agreement provides: that the DM&IR/WCL trackage rights agreement pertaining to DM&IR trackage between South Itasca, WI, and Pokegama, WI, will be amended to allow WCL to use the trackage rights granted thereunder to interchange all traffic with any other carrier at Pokegama Yard, subject to certain restrictions; that the DM&IR/WCL trackage rights agreement pertaining to DM&IR trackage between South Itasca, WI, and Saunders, WI, will be revised by deleting that agreement's "per loaded car mile" rate formula and by inserting in lieu thereof the "per loaded car" rate applicable to the DWP under the DM&IR/DWP trackage rights agreement, as that rate may subsequently be escalated; that DM&IR will be allowed to remove the "Ambridge Diamond" track structure associated with the at-grade crossing of WCL track and DM&IR track at Ambridge, WI;⁹⁰ that DM&IR will serve the Koppers facility (at Ambridge, WI) for CN on a reciprocal switch basis, at

⁸⁹ GLT insists that the fact that shippers will not be able to demand an unprofitable rate from CN/WC will not deprive them of a meaningful option. Any such rate, GLT explains, would not be sustainable in the long run, and its availability likely would cause harm to other important transportation options, including Great Lakes shipping.

⁹⁰ Removal of the "Ambridge Diamond" track structure will eliminate the need for DM&IR to provide ongoing maintenance and repairs at this site. See CN/WC-16 at 29.

\$50 per loaded car;⁹¹ and that, in connection with the reconstruction of the Oliver Bridge (which spans the St. Louis River between Minnesota and Wisconsin), CN will pay \$1.9 million to DM&IR, with payments to be made as expenses are incurred.⁹²

(3) As respects other matters, the GLT/CN Agreement provides: that CN and GLT will each request that the Board impose without qualification, as a condition of its approval of the CN/WC control transaction, a requirement that CNR and its affiliates continue to comply with the GLT/CN Agreement in accordance with and subject to its terms and conditions so long as GLT and DM&IR remain materially in compliance with the GLT/CN Agreement; that CN and GLT will each actively support the unqualified imposition of such a condition on the grounds, among others, that the condition is commercially reasonable and fully consistent with the Board's authority to impose conditions pursuant to 49 U.S.C. 11324(c); that the GLT/CN Agreement will terminate if the Board issues a decision approving the CN/WC control transaction but does not impose, without qualification, the condition contemplated by the GLT/CN Agreement; that, furthermore, the GLT/CN Agreement will terminate if the Board issues a decision denying approval of the CN/WC control transaction, or if, for any reason, the Board has not issued a decision on the merits of the CN/WC control transaction by October 9, 2001; and that, if a dispute arises under the GLT/CN Agreement between or among the parties thereto that the parties cannot resolve, GLT or DM&IR may seek enforcement by the Board of any condition imposed by the Board, and any party may (upon 10 days prior notice to the other party or parties) submit any dispute arising out of or relating in any way to the GLT/CN Agreement to arbitration (in accordance with the Commercial Arbitration Rules of the American Arbitration Association).

Public Interest Analysis. GLT contends that the GLT/CN Agreement serves the public interest. GLT explains: that the arrangement by which DM&IR will serve as agent for CN/WC for rail movement of taconite originating on DM&IR will ensure that shippers will have a full range of rail and water options available to them, and will provide assurance that the choice among such options will be made based on what makes economic sense rather than on shipper responses to predatory or strategic conduct;⁹³ that, under this cooperative agency arrangement,

⁹¹ The grant to CN/WC of reciprocal switching rights at the Koppers facility would enable CN/WC to maintain efficient access to that facility following the removal of the "Ambridge Diamond" track structure. See CN/WC-16 at 30-31.

⁹² GLT indicates that the Oliver Bridge, which is used by DM&IR and CN trains moving between Duluth and points south, is a crucial element of the infrastructure comprising CN/WC's mainline route between Canada and the Chicago gateway.

⁹³ GLT claims that, although the antitrust laws provide some protections against the potential for predatory conduct, there are various hurdles to enforcement of such protections.

(continued...)

DM&IR and CN/WC will have incentives to choose the most efficient and cost-effective routing, so as to compete more effectively with taconite movements on other carriers;⁹⁴ that, at the same time, the arrangement offers shippers greater flexibility and the benefit of one-stop shopping; and that, under the agency arrangement, CN/WC will continue to have the right to set its revenue requirements independently, which will allow CN/WC to price its segment as aggressively as it sees fit (subject, of course, to any applicable legal restrictions on predatory or other anticompetitive pricing) in seeking to compete with waterborne carriers. GLT further explains that, because Escanaba (which is not directly served by DM&IR) remains open for shipping at certain times when Duluth and Two Harbors (which are directly served by DM&IR) are closed for the winter, the requirement that CN/WC provide DM&IR with a rate factor for taconite originating on DM&IR and moving to Escanaba both provides shippers with greater flexibility and directly addresses the concern that unconditioned approval of the CN/WC control transaction would threaten the viability of the Great Lakes transportation industry by causing substantial

⁹³(...continued)

GLT further claims that the commercial framework established by the GLT/CN Agreement, with CN's compliance enforced by the Board, would provide greater assurance that predatory conduct will be deterred, and would thus assure that large diversions of taconite traffic to all-rail routings will occur only if the underlying economics (or other shipper preferences) favor such routings. GLT notes, in this context, that a number of the entities in the Great Lakes region that had previously expressed concern about the effects of the CN/WC control transaction have concluded that, because the GLT/CN Agreement addresses their concerns, they can support approval of the transaction so long as the agreement is imposed as a condition of approval. See GLT-18, Attachment C (letters urging approval of the transaction subject to CN's compliance with the agreement).

⁹⁴ GLT contends that because its customers — the taconite producers served by DM&IR and the steel manufacturers that receive DM&IR-originated ore — operate in fiercely competitive markets, DM&IR will be under strong pressure to develop the DM&IR-CN/WC all-rail route to its full potential to avoid disadvantaging its customers. GLT further contends that it will not be in a position to dictate a rail-water route if shipper preferences or the underlying economics come to favor an all-rail route. GLT adds: that any DM&IR route (rail-water or all-rail) will have to compete against BNSF's single-line route from certain Iron Range origins to Chicago and other gateways; that interline routes that include DM&IR and other carriers serving the Duluth/Superior area (i.e., UP and CP) will not be affected by the GLT/CN Agreement; that, in addition, there are numerous other sources of taconite, including mines in Upper Michigan as well as numerous foreign sources, that will create competitive pressures on DM&IR; and that, furthermore, in view of the present global overcapacity in the steel industry, steel producers have strong incentives to shift production among their facilities in response to differences in input costs.

taconite traffic currently moving on the Great Lakes to be diverted to an all-rail routing.⁹⁵ And, GLT adds, the GLT/CN Agreement, by resolving various operational controversies involving DM&IR, on the one hand, and, on the other hand, CN and WC, eliminates any need for the Board to resolve these controversies and will help to improve the efficiency of post-transaction rail operations in the Duluth/Superior area.

Request For Imposition Of Condition. GLT contends that the Board should approve the CN/WC control transaction subject to the unqualified condition that CN and its affiliates comply with the terms of the GLT/CN Agreement, so long as GLT and DM&IR remain materially in compliance with that agreement.⁹⁶ GLT argues: that the GLT/CN Agreement dispels any concern that the CN/WC control transaction might have adverse effects on competition; that, in fact, the GLT/CN Agreement both preserves and promotes competition; that, in particular, the GLT/CN Agreement preserves the existing ability of customers to choose between rail-water and all-rail routings depending on which is more economical, and also preserves DM&IR's rights as originating carrier; and that, in several respects (including new access for DM&IR to the Escanaba dock), the GLT/CN Agreement allows both GLT and the merged CN/WC to become more effective competitors, and provides additional transportation options and greater flexibility for the carriers and their customers. GLT further argues that the Board should adopt the terms of the GLT/CN Agreement as a § 11324(c) condition to the Board's approval of the CN/WC control transaction in order to insulate the GLT/CN Agreement from an antitrust challenge. GLT explains, in essence, that, although GLT and CN/WC are confident that the GLT/CN Agreement would survive an antitrust challenge, the cost (in terms of time and resources) of defending against an antitrust challenge could in itself be significant. GLT further explains that, for this reason, GLT and CN/WC have conditioned their assent to the settlement terms, and GLT has conditioned its support of the CN/WC control transaction, upon the adoption of the GLT/CN Agreement as a condition to the Board's approval of the CN/WC control transaction.⁹⁷

The B&LE Abandonment Issue. GLT contends that the Board should reject AK Steel's request for a condition requiring GLT to maintain service to AK Steel's facility at Butler, PA.

⁹⁵ GLT notes that, without the GLT/CN Agreement, DM&IR and its shippers would have no assurance that CN/WC would cooperate in providing a reasonable rate factor for movements of taconite between Duluth/Superior and Escanaba.

⁹⁶ Applicants too have asked that the Board approve the GLT/CN Agreement as a condition of the CN/WC control transaction. See CN/WC-16 at 37.

⁹⁷ GLT notes that, although the adoption of the GLT/CN Agreement as a condition to the Board's approval of the CN/WC control transaction would immunize the agreement against an antitrust challenge, the Board would continue to have jurisdiction with respect to the terms of the agreement. See GLT-18 at 14 n.31.

GLT insists that, although it continues to believe that B&LE would continue service on the southern portion of its line even if there were substantial diversions of taconite from the rail-water-rail route, there is no basis for imposing any condition to enforce this expectation. GLT argues: that the Board's conditioning authority does not authorize the Board to impose conditions on non-applicants; that, in addition, GLT has not "represented" that it will not take any actions to abandon service to AK Steel's Butler facility (rather, GLT advises, it has merely stated that it no longer believes that loss of service to AK Steel and other shippers on the southern part of the B&LE line would be a likely result of the CN/WC control transaction); and that, furthermore, GLT should not be artificially constrained in its ability to seek authority to abandon portions of the B&LE if future economic conditions render their continued operation unprofitable.

RailAmerica. RailAmerica, which owns shortlines that operate in 22 states and six Canadian provinces, urges approval of the CN/WC control transaction, which (RailAmerica believes) will generate public benefits without harming competition.

Transportation Institute. The Transportation Institute, which represents U.S.-flag shipping companies providing services on the Great Lakes waterway system, indicates that it has reservations about the CN/WC control transaction. The Transportation Institute explains: that its reservations reflect not a fear of additional rail competition but, rather, the potential for unfair and predatory rail competition; that the matter of particular concern involves the carriage of taconite pellets from iron ranges in Northern Minnesota to steel mills located throughout the U.S. Great Lakes region; that, under present conditions, the movement of taconite via waterborne transport is a cost-effective method of providing the American steel industry with basic raw materials, and rail transport is competitive only during the limited period (typically about two winter months a year) when, due to extreme weather conditions, U.S.-flag shipping assets cannot be utilized; and that there is reason to fear that predatory pricing by CN/WC to gain market share would devastate U.S. maritime assets in the region. The Transportation Institute adds that the maintenance of the waterborne transportation system is vital not only to the economic health of the region but also to the national security of the United States (because, the Transportation Institute advises, the waterborne transportation system not only provides for the shipment of raw materials for the national industrial base, it also preserves essential sealift resources through the maintenance of the U.S. shipbuilding base and critical operational expertise and manpower assets). The Transportation Institute therefore contends that the Board should reject the CN/WC control transaction unless it contains significant legal restraints preventing the anticipated impact on the U.S.-flag fleet and related industries. And, the Transportation Institute adds, any approval of the CN/WC control transaction should include a permanent mechanism that would allow for the immediate reopening of this proceeding if such a negative impact on the marine industry were to materialize.

National Railroad Passenger Corporation. Amtrak indicates that it neither opposes, nor seeks the imposition of conditions on, the CN/WC control transaction. Amtrak maintains,

however, that CN's assertion that the CN/IC control transaction "did not cause problems with Amtrak's passenger service," CN/WC-2, Vol. 1 at 394, is not entirely correct. Amtrak explains that, since the consummation of the CN/IC control transaction on July 1, 1999, there has been a noticeable decline in the on-time performance of the Amtrak train (the "Illini") that operates over the former IC north-south main line between Chicago, IL, and Carbondale, IL (on-time performance of the northbound Illini, Amtrak advises, has declined from more than 92% during the 12-month period preceding consummation of the CN/IC control transaction to approximately 77% during the most recent 12-month period for which Amtrak has complete data). Amtrak adds: that this decline in performance is primarily attributable to increased freight train interference; that, however, Amtrak and CN have been working cooperatively in an effort to improve the Illini's performance; and that, although the CN/WC application projects an increase in post-transaction freight traffic between Chicago and Carbondale, the projected increase is "modest" (approximately one additional freight train per day).

APPENDIX D: GOVERNMENTAL PARTIES

United States Department of Transportation. (1) *The CN/WC Control Transaction, In General.* DOT believes that the CN/WC control transaction warrants approval. DOT notes: that this largely end-to-end transaction will deprive no shipper of intramodal competition; that applicants have pledged to maintain gateways and interchanges on reasonable terms; and that the NITL/CN Agreement provides additional protections against adverse impacts.

(2) *Post-Transaction Monitoring.* DOT contends that, although CN/WC's post-transaction operations may introduce consequences (competitive consequences, service consequences, or environmental consequences) that may require the Board's attention, the evidence of record does not now support adoption of a specific condition to address this possibility. Rather, DOT further contends, the evidence of record at this point simply suggests that the Board: should acknowledge the potential for harm; should state that it will monitor developments; and should indicate its willingness to consider evidence demonstrating post-transaction adverse consequences and identifying appropriate mitigation measures.

(3) *The NITL/CN Agreement.* DOT indicates that — because the CN/WC control transaction does not present anticompetitive problems, and because applicants have committed to maintain open gateways and interchanges on reasonable terms — DOT does not believe that the terms of the NITL/CN Agreement are necessary to warrant the Board's approval of the underlying transaction. DOT adds, however, that applicants and NITL are to be commended for voluntarily negotiating in order to alleviate shipper concerns; and, DOT further adds, it believes that the availability of arbitration in place of regulatory procedures will prove particularly attractive to many shippers. DOT, which states that NITL has requested that the Board impose the terms of the NITL/CN Agreement and hold the applicants to their contract exception commitment as conditions of approval,⁹⁸ indicates that it supports adoption of the NITL/CN Agreement as a condition of the transaction's approval.

(4) *Bottleneck Rule; Contract Exception.* DOT indicates that it is uncertain whether in contract exception cases the NITL/CN Agreement's arbitration provision contemplates substituting an arbitrator for the Board, or whether in such cases CN has simply agreed to waive otherwise available defenses before the Board. DOT adds that, if the former is contemplated, the Board may wish to monitor arbitration results.

(5) *Taconite Traffic; The Viability Issue.* DOT contends that the evidence of record suggests that, at least for the foreseeable future, the CN/WC control transaction is unlikely to

⁹⁸ Although NITL has requested that the Board hold the applicants to their contract exception commitment, NITL has not requested that the Board impose the terms of the NITL/CN Agreement.

lead to the diversion of taconite to all-rail routings in volumes sufficient to pose a realistic threat to water transportation in the Great Lakes region. DOT adds, however, that, in view of the importance of Great Lakes water carriage to the United States transportation infrastructure, the Board should express its willingness to consider evidence of harm arising from the CN/WC control transaction. DOT indicates that, although it is recommending neither a formal oversight proceeding nor an open-ended period of time for consideration of any such information, it is recommending that the Board monitor developments in this area for a period of 3 to 5 years, and invite parties to submit (during that period) evidence of any harm to Great Lakes water carriage caused by the CN/WC control transaction. This approach, DOT advises, would provide the Board with an informed basis for decisionmaking.

(6) *Taconite Traffic; The GLT/CN Agreement.* DOT contends that the agency arrangement that is at the heart of the GLT/CN Agreement presents antitrust concerns. DOT explains: that it is difficult to imagine that DM&IR would seriously seek to lure taconite traffic away from its affiliates in the GLT corporate structure when those affiliates (if not the entire structure) depend upon that traffic continuing in the rail-water mode; that, therefore, it would seem that this aspect of the GLT/CN Agreement resembles either a *de facto* agreement not to compete or a *de facto* agreement among competitors to divide a market; that such agreements are *per se* violations of § 1 of the Sherman Act; that arrangements that arguably would lead to such anticompetitive results are not generally in the public interest; and that the parties have offered no convincing reason why it should be otherwise in the context of a settlement of their differences in this case. DOT further explains that it is uncertain about the effect, if any, of (a) the provision in the GLT/CN Agreement barring applicants from offering rates for their segments of all-rail movements, on (b) applicant's commitment to waive all defenses in "contract exception" bottleneck cases. DOT concludes: that, regardless of the existence of conditions that seem to favor the rail-water option at this time, the Board should not impose the GLT/CN Agreement as a condition of approval of the CN/WC control transaction; that, rather, the GLT/CN Agreement should be "freestanding" and should be subject to the antitrust laws like other contractual agreements between competitors; and that applicants and GLT should decide whether they wish to proceed with it on that basis.

(7) *Canadian Pacific.* DOT indicates that it does not support the conditions sought by CP. (a) As respects CP's gateway preservation condition, DOT explains: that this is an end-to-end transaction that does not directly threaten competition; that applicants have not made illusory promises to shippers, but, rather, have committed unequivocally to keep all existing gateways and interchange points affected by the transaction open on commercially reasonable terms; and that, furthermore, the terms of the NITL/CN Agreement offer additional benefits to shippers. DOT argues that, because these provisions (taken together) should assure shippers of workable negotiations on joint-line arrangements with connecting carriers, there is no basis for CP's claim of cognizable anticompetitive harm that demands redress. And, DOT adds, CP, by attempting to obtain for itself the benefit of arbitration allowed shippers under the NITL/CN Agreement, is seeking to alter the traditional means (negotiation between willing railroads) by

which railroads arrive at joint routes and rates. (b) As respects CP's Green Bay haulage agreement extension condition, DOT indicates that it is not convinced that the Board should override the contractually agreed-to cancellation term (in the CP-WC haulage agreement) in order to protect shippers from a loss of competition. DOT explains: that the underlying transaction poses no threat to competition generally; that the terms of the NITL/CN Agreement and the applicants' own waiver of defenses in "contract exception" cases should address the specific concerns of shippers that would otherwise benefit from the CP-WC haulage agreement; and that this haulage agreement is unrelated to the CN/WC control transaction.

(8) *Vulcan Chemicals*. DOT contends that applicants' representations and the NITL/CN Agreement satisfactorily address Vulcan's concerns about open gateways and interchanges. DOT further contends that the NITL/CN Agreement also answers, at least in part, Vulcan's request for a condition limiting cost increases in the switching fee. DOT explains: that, under § 3(b) of the NITL/CN Agreement, for 5 years the merged CN/WC can increase its portion of the rate on interlined traffic by no more than the change in the RCAF-U; and that, under the NITL/CN Agreement, Vulcan has the right to seek arbitration if it disputes these cost increases or charges. DOT adds that, although Vulcan apparently would have switching charge increases limited to costs in perpetuity rather than for 5 years, there is no basis to override the bargain struck by the parties.

(9) *Environmental Issues*. DOT contends that the relatively minor changes in traffic projected in the application appear to warrant a finding that the CN/WC control transaction is likely to generate no significant environmental or community impacts. DOT further contends, however: that such forecasts are not always accurate; that, moreover, applicants, in implementing their transaction, may modify their operational or other plans; that imperfection in the ability to project future events should not redound to the detriment of those who actually experience the real-world consequences of those future events; and that, just as merger applicants are required to address the environmental and community impacts of their original operating plans, they should also be required to address the environmental and community impacts of their actual post-merger operations. DOT therefore urges the Board to afford affected communities and others the opportunity to demonstrate significant adverse impacts from merger-related traffic changes that occur in the "near future." DOT adds that, because this is not meant to cover growth or changes resulting from normal business activities and changes over time, a period of approximately 3 years should be adequate to separate changes that arise from the transaction at issue from otherwise ongoing commercial circumstances. DOT has in mind that, within the 3-year period, the Board would allow for the creation of a record, contributed to by interested parties, on which to base decisions on harms and mitigation measures.

(10) *Safety Issues*. DOT indicates that the Federal Railroad Administration (FRA) is generally satisfied with the Safety Integration Plan (SIP) prepared by applicants, and believes that, as respects the implementation process now envisioned by applicants, the steps contained in the SIP should ensure a safe integration of applicants' operations. DOT further indicates,

however, that there is one matter of serious potential concern to FRA: the SIP, DOT explains, would permit CN/WC to move the dispatching of WC rail operations to Canada. DOT adds that, although applicants have indicated that they have no present intention of making such a move, they have not altogether forsworn making such a move, but, rather, have represented that any changes “would be made in consultation with FRA.” DOT, which insists that the possibility that significant rail operations within the United States would be dispatched from outside the United States⁹⁹ remains a matter of serious concern (primarily on account of differences in the U.S. and Canadian rules respecting hours of service, efficiency testing, and drug/alcohol testing), requests that the Board: impose a condition on any approval of the CN/WC control transaction requiring that CN adhere to its representation to consult with FRA in advance of any future changes that would involve moving control of train movements over the WC system to dispatchers located outside of the U.S; retain jurisdiction “for this purpose”; and allow for a 3-month consultation period within which FRA would work with CN to address in detail the issues that would arise from a transfer of the dispatching function to Canada. DOT adds that FRA would report to the Board on the results of its discussions with CN, and would indicate at that time any recommendations it might have.

United States Department of Agriculture. (1) USDA indicates that, although it neither supports nor opposes the CN/WC control transaction, it believes: that any anticompetitive effects of this transaction will clearly be outweighed by the transaction’s contribution to the public interest in meeting significant transportation needs; that many shippers will benefit from this transaction; and that this transaction, if conditioned by the NITL/CN Agreement, will have few discernible competitive or service effects on shippers. USDA adds that, based upon the nearly flawless integration of IC into CN in 1999, there is no reason to expect that the integration of WC into CN will result in significant service disruptions, especially since CN’s “service-oriented management” plans to use a deliberate step-by-step approach to integration. (2) USDA contends that, if the Board approves the CN/WC control transaction, approval should be conditioned by the NITL/CN Agreement, which (USDA explains) should alleviate many shipper concerns regarding potential abuses of railroad market power. USDA contends, in particular, that the NITL/CN Agreement greatly alleviates USDA’s concerns that the CN/WC control transaction could adversely affect BNSF vs. CP competition for the origination of North Dakota barley that is delivered to Wisconsin breweries by WC. (3) USDA indicates that, although it is not opposed to the CN/WC control transaction, it cannot support this transaction in view of its concerns regarding continuing concentration in the rail transportation market. USDA warns: that, over the past 20 years, the decline in the number of Class I railroads has resulted in increased overall levels of market concentration and reduced competition in the railroad industry, which (USDA adds) has affected U.S. agriculture more than any other industrial sector; that such concentration, if unabated, could increase the bargaining-power disadvantage of shippers and

⁹⁹ DOT indicates that CN now uses Canadian-based dispatchers to control trains operating on only 47.3 miles of U.S. track. See DOT-1 at 4 n.2.

smaller railroads; and that, although the CN/WC control transaction may lead to increased rail competition in the Midwest, this transaction may also lead either to the creation of a North American railroad duopoly or to the geographic expansion of an existing regional rail monopoly.

Illinois Department of Transportation. (1) IDOT supports the CN/WC control transaction on the condition that the Illinois job reductions projected by applicants will be accomplished through normal attrition. IDOT adds that it expects that such reductions (69 jobs over a 3-year period, IDOT notes) will in fact be accomplished through normal attrition. (2) IDOT believes that the CN/WC control transaction will provide significant benefits to the shipping public (IDOT notes, in particular, that new single-line service across the CN/WC system could better meet the needs of companies that rely on the movement of commodities that are sensitive to transportation costs and that are highly truck-competitive) and will enable WC to access the resources it needs to continue to invest in high quality service. And, IDOT adds, the CN/WC control transaction will allow CN/WC to provide more efficient service to WC-served shippers of corn and soybeans that rely on rail to reach markets in the Chicago area. (3) IDOT indicates that the CN/WC control transaction will have no adverse impact on Amtrak and commuter passenger service, because (IDOT explains) there will be only one additional train each way (3 days per week) on lines used for passenger (including commuter) operations, and there will be fewer trains per week on the WC segment used by Metra¹⁰⁰ between Antioch and Chicago.

State of Michigan. Governor John Engler, writing on behalf of the State of Michigan, supports the CN/WC control transaction, and, noting that CN and WC now provide service in the Lower Peninsula and the Upper Peninsula, respectively, requests that CN develop an operating plan that reflects the same strong presence in and commitment to the Upper Peninsula that WC has shown.

Wisconsin Department of Transportation. WisDOT supports the CN/WC control transaction, and requests that CN: keep existing CN and WC gateways open; preserve existing low density lines; respond timely and reasonably to requests from WisDOT and other governmental entities regarding crossings and rights-of-way; minimize employment losses; cooperate with existing Wisconsin railroads; provide quality rail freight service at reasonable rates; and work with WisDOT to implement new rail passenger service.

City of Des Plaines, Illinois. The City of Des Plaines, located northwest of Chicago, maintains that additional rail traffic on the WC line that runs through Des Plaines would have an adverse effect on the citizens of Des Plaines. The City explains: that it is currently in litigation

¹⁰⁰ The Commuter Rail Division of the Regional Transportation Authority of Northeast Illinois d/b/a Metra is referred to as Metra.

before the Illinois Commerce Commission with WC and UP regarding an old wooden train trestle from which debris has been falling onto a road that feeds into Interstate Highway 294; that, in the past 2 years, more than 24 incidents have been reported of items falling from the trestle or from trains traveling over the trestle; that, therefore, there is reason to believe that this trestle cannot handle even the existing level of rail traffic that uses this trestle; that, however, the CN/WC control transaction is likely to result in additional traffic moving over this trestle; and that, furthermore, indications are that there will soon be an increase in passenger rail traffic over this trestle (the new commuter rail service that comes from Antioch into Chicago, the City advises, uses this trestle). Any additional rail traffic over this trestle, the City warns, would increase safety concerns and environmental risks. The City asserts that any such additional traffic would not be warranted; there are, the City argues, alternative surface methods such as shipping that could adequately handle transport of environmental waste and other items.

City of East Chicago, Indiana. The City of East Chicago, located in northwest Indiana, is concerned that the CN/WC control transaction may result in the diversion of taconite traffic from a Great Lakes water routing to an all-rail routing. The City contends that, if such diversion occurs, the additional train traffic through East Chicago will mean increased surface transportation delays, increased pollution, an increased risk of accidents at grade crossings, and an increased likelihood that grade crossings will be blocked from use by emergency vehicles. The City further contends: that these problems can be fully avoided by allowing the taconite to remain on the Great Lakes; that lake vessels are extremely safe, fuel efficient, and environmentally friendly; and that, if diversions to all-rail movements do occur, measures to address pollution and safety concerns will be necessary. The City adds that, at a minimum, the Board (if it approves the CN/WC control transaction) should impose a 3-year environmental oversight condition to afford affected communities and others the opportunity to demonstrate significant adverse impacts from merger-related traffic changes.

City of Gary, Indiana. The City of Gary, also located in northwest Indiana, is concerned that, if the post-transaction CN/WC succeeds in diverting to an all-rail routing taconite traffic now moving over the Great Lakes, there will be a significant increase in the number of trains traveling through Gary. The City adds that the potential impact on Gary (in terms of pollution, grade crossing accidents, and grade crossing blockages) of these long slow-moving trains, loaded with very heavy taconite, will be substantial. The City asserts that, although any form of transportation entails some level of risk, in this case these risks can be fully avoided by allowing the taconite to remain on the Great Lakes. The City further asserts that, if diversions to all-rail movements do occur, measures to address pollution and safety concerns will be necessary. The City adds: that the Board should afford affected communities and others a post-transaction opportunity to demonstrate significant adverse impacts from merger-related traffic changes; that a period of approximately 3 years should be adequate to separate changes that arise from the CN/WC control transaction from changes that arise from ongoing commercial circumstances; that, during the 3-year period, the Board should allow for the creation of a record, contributed to by interested parties, on which to base decisions on harms and mitigation measures; and that the

Board should be prepared to impose new conditions, if necessary, to address unforeseen harms. An imperfection in the ability accurately to project the future, the City believes, should not redound to the detriment of those who actually experience the real-world consequences of that future.

City of Hammond, Indiana. The City of Hammond, also located in northwest Indiana, is concerned that the CN/WC control transaction may result in the diversion of large amounts of taconite from movement via the Great Lakes to movement via an all-rail routing. The City warns that, if such diversion occurs, there will be significant additional railroad traffic through Hammond, which (the City claims) will mean increased pollution, an increased risk of accidents at grade crossings, an increased likelihood of grade crossing blockages, and a decrease in the overall quality of life in Hammond. These risks, the City asserts, can be fully avoided by allowing the taconite to remain on the Great Lakes. The City adds: that, if diversions to an all-rail routing do occur, measures to address pollution and safety concerns will be necessary; that, therefore, the Board, at a minimum, should impose a 3-year oversight condition to afford affected communities and others the opportunity to demonstrate significant adverse impacts from merger-related traffic changes; and that, during the 3-year oversight period, the Board should allow further creation of a record, contributed to by interested parties, on which to base decisions on harms and mitigation measures.

APPENDIX E: LABOR PARTIES

Brotherhood of Locomotive Engineers. (1) BLE, the collective bargaining representative for locomotive engineers on the CN, IC, GTW, and WC railroad properties, indicates that it “conditionally is unopposed” to the CN/WC control transaction, BLE-4 at 2, based upon applicants’ commitments regarding employee protection and training, as well as the expectation that there will be no loss of employment among the employees BLE represents. (2) BLE, which notes that applicants have committed to apply the employee protective conditions established in New York Dock, CN/WC-2, Vol. 1 at 412, and to “focus significantly on training to ensure that all present employees acquire the necessary skills to continue operating safely and efficiently in their new environments,” CN/WC-2, Vol. 1 at 411, indicates that it expects “that the Board will condition its approval of this railroad control application, in part, based upon these commitments,” BLE-4 at 2. (3) BLE, which notes that applicants have projected a net reduction of one engineer position over the entire CN/WC system (see CN/WC-2, Vol. 1 at 417-19; BLE-4 at 2), asserts that, if applicants’ projections are accurate, this net reduction should be handled through attrition and that, therefore, there should be no loss of employment in the engineer craft.

American Train Dispatchers Department. (1) ATDD indicates that it neither supports nor opposes the CN/WC control transaction. (2) ATDD, which notes that applicants have represented in their Safety Integration Plan that U.S. operations currently dispatched out of the U.S. will continue to be dispatched from the U.S., and that any changes will be made in consultation with FRA, contends that the Board, if it approves the CN/WC control transaction, should specifically hold applicants to the representations they have made regarding keeping train dispatching control over domestic trackage within the United States. This issue, ATDD argues, carries significant safety ramifications. (3) ATDD contends that the Board, if it approves the CN/WC control transaction, should impose the New York Dock conditions as a condition of its approval.

Brotherhood Of Maintenance Of Way Employes. (1) *In General.* BMWWE indicates that it neither supports nor opposes the CN/WC control transaction. BMWWE contends, however, that the CN/WC control transaction raises unique questions regarding operational implementation, because (BMWWE explains) this transaction involves the merger of a nonunionized carrier (BMWWE notes that, on WC, many crafts or classes of employees are not represented) into a larger unionized system. BMWWE insists, in essence, that there are two primary problems respecting operational implementation: there is a question as to what group would bargain on behalf of nonunionized WC employees; and there is a danger that CN/WC may attempt to use the New York Dock implementing agreement arbitration procedure to abrogate existing CN CBAs.

(2) *Bargaining Representative Identity Issue.* With respect to the bargaining representative identity issue, BMWWE contends that it does not suffice merely to say that carrier

management cannot dictate implementing agreement terms to non-union employees. BMW maintains, in essence, that the Board should provide further guidance on this question.

(3) *New York Dock Implementing Agreement Arbitration Issue.* With respect to the New York Dock implementing agreement arbitration issue, BMW notes that, although most of the Class I railroads, on the one hand, and, on the other hand, BMW and several other unions, have reached an agreement (referred to as the “Revised Standards for Preemption of Collective Bargaining Agreements for Transactions Initiated Pursuant to Section 11323 of the Interstate Commerce Act”) that resolves the preemption issue (the issue as to the modification of CBAs),¹⁰¹ CN has never become a party to this agreement. BMW further notes that, because CN has not become a party to this agreement, any New York Dock implementing agreement arbitration would be subject to review by the Board under the traditional standards applicable to such matters, which (BMW warns) might enable CN/WC to abrogate all existing CN CBAs and representation structures in the maintenance of way craft or class.

(4) *Sanctity Of CBAs.* BMW acknowledges that, because the CN/WC control transaction is not a “major” merger, the Board’s new regulation respecting the sanctity of CBAs (“[T]he Board respects the sanctity of collective bargaining agreements and will look with extreme disfavor on overrides of collective bargaining agreements except to the very limited extent necessary to carry out an approved transaction.”)¹⁰² does not apply to the CN/WC control transaction. BMW contends, however, that, to forestall any effort by CN/WC to use the New York Dock implementing agreement arbitration procedure to abrogate existing CN CBAs and representation structures, the Board should include the quoted language in any order approving the CN/WC control transaction.

IAMAW and IBEW. (1) IAMAW and IBEW indicate that they neither support nor oppose the CN/WC control transaction. (2) IAMAW and IBEW note that applicants have stated (in their CN/WC-8 discovery submission) that applicants do not have any current plan or intention to transfer, as part of the CN/WC control transaction, any mechanical work or any mechanical positions: from any CN mechanical facility to any WC mechanical facility; or from any WC mechanical facility to any CN mechanical facility. IAMAW and IBEW further note that applicants have also stated that they do not have any current plan or intention to abolish, as part of the CN/WC control transaction, any mechanical positions at any CN mechanical facility. IAMAW and IBEW contend that the Board, if it approves the CN/WC control transaction: should specifically hold applicants to the representations they made in their discovery submission; and should monitor applicants’ compliance with that “obligation.” (3) IAMAW and

¹⁰¹ See Major Rail Consolidation Procedures, slip op. at 226-27.

¹⁰² See new 49 CFR 1180.1(e) (Major Rail Consolidation Procedures, slip op. at 32).

IBEW contend that the Board, if it approves the CN/WC control transaction, should impose the New York Dock conditions as a condition of its approval.

United Transportation Union. UTU, in its supplemental comments filed September 4, 2001, indicates that, based on CN's statement (in a letter dated August 30, 2001) that CN "will not use New York Dock processes to replace any existing CN/IC UTU agreements with the agreement between the Wisconsin Central and the UTU," UTU fully supports the CN/WC control transaction. UTU asks, in its supplemental comments filed September 4, 2001, that the Board approve this transaction subject to the condition that applicants comply with the terms of CN's statement, which reads (essentially in its entirety): "This letter is to confirm that Canadian National will not use New York Dock processes to replace any existing CN/IC UTU agreements with the agreement between the Wisconsin Central and the UTU. As we have stated, it is our intent to reach mutually acceptable implementing agreements should our operating plans require an integration of CN/IC and WC operations." This arrangement, UTU argues, is in line with the Board's past statements that it supports negotiated agreements whenever possible, that it respects the sanctity of CBAs, and that it would look with disfavor on overrides.

Allied Rail Unions (BRS, IBB, NCFO, and SMW). (1) ARU indicates that it neither supports nor opposes the CN/WC control transaction. (2) ARU further indicates that it agrees with the concerns raised by BMW and UTU regarding the potential use of approval of the CN/WC control transaction to effect the abrogation of CBAs. ARU argues that the Board should address those concerns by imposing the two recent "cramdown agreements," see Major Rail Consolidation Procedures, slip op. at 220-21 and 226-27, as a condition of approval of the CN/WC control transaction. These agreements, ARU maintains, constitute a basic acceptable arrangement for dealing with issues relating to CBAs that arise in the context of merger/control transactions under 49 U.S.C. 11323. (3) ARU agrees that, if we approve the CN/WC control transaction, we should state in our decision that we "respect[] the sanctity of collective bargaining agreements and will look with extreme disfavor on overrides of collective bargaining agreements except to the very limited extent necessary to carry out an approved transaction." Major Rail Consolidation Procedures, slip op. at 32. (4) ARU contends that, if we approve the CN/WC control transaction, we should bind applicants "to the representations they made in seeking approval, specifically, in their responses to the interrogatories propounded by IAMAW and IBEW." ARU-2 at 1-2.